(1)

No. 90-1076

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JULIUS L. CHAMBERS,

Petitioner,

vs.

UNITED STATES DEPARTMENT OF THE ARMY; MICHAEL P.W. STONE, Secretary, U.S. Department of the Army,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether counsel may be sanctioned for pursuing legally sufficient Title VII claims because he or she does not anticipate that the finder of fact will make adverse credibility findings?

2. Whether the provision in Title VII specifically prohibiting the United States from recovering attorneys' fees as a prevailing party limits an award of attorneys' fees under 28 U.S.C. § 1927 (1988), Rules 11 and 16(f) of the Federal Rules of Civil Procedure, or the common law?

LIST OF PARTIES

The parties in the Fourth Circuit proceeding were: Sandra L. Blue; Beulah Mae Harris; Ferguson, Stein, Watt, Wallas & Adkins, P.A.; Geraldine Sumter; Julius L. Chambers; the NAACP Legal Defense and Educational Fund, Inc.; and the United States Department of the Army. In the court below, John O. Marsh, Jr. was named as a defendant-appellee in his official capacity as the Secretary of the Army. Pursuant to Supreme Court Rule 35.3, Michael P.W. Stone, Mr. Marsh's successor, has been substituted as a party in this Court.

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OPINIONS BELOW

The opinion and order of the United States District Court for the Eastern District of North Carolina initially imposing sanctions upon petitioner (A-55)* is reported at 679 F. Supp. 1204. The decision was modified by two later orders (A-537, A-599), one of which is reported at 123 F.R.D. 204. The opinion of the United States Court of Appeals for the Fourth Circuit, affirming in part and reversing in part (A-1), is reported at 914 F.2d 525. The district court subsequently issued an order on remand, which has not been reported. A-605.

* "A-____" refers to pages in the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1990 (A-47). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISIONS AND RULES INVOLVED

The pertinent text of the following statutory provisions and rules involved in this case is set forth in the Appendix:

1. 28 U.S.C. § 1927.
2. 42 U.S.C. § 1988.
3. 42 U.S.C. § 2000e-5(k).
4. 42 U.S.C. § 2000e-16.
5. Fed. R. Civ. P. 11.
6. Fed. R. Civ. P. 16.

STATEMENT OF THE CASE

This case concerns Title VII race discrimination claims filed against the United States Army regarding its civilian employment practices. After almost seven years of litigation, during which most of the claims were settled, the United States District Court for the Eastern District of North Carolina dismissed the remaining claims and imposed sanctions of almost $90,000 against two of the plaintiffs (Sandra Blue and Beulah Mae Harris) and their counsel under Rules 11 and 16 of the Federal Rules of Civil Procedure, 28 U.S.C. § 1927 (1988), and the common law. A-55. Petitioner, attorney Julius Chambers, had ultimate responsibility for plaintiffs' case before the district court.

The United States Court of Appeals for the Fourth Circuit, in reversing part of the sanctions award, observed that the district

court "not only invoked every conceivable legal theory on which sanctions could be imposed, but also levied every conceivable sanction." A-1. Although the appellate court recognized that counsel proffered prima facie claims of employment discrimination, it held that counsel should have realized that there was "no *credible* evidence of racial discrimination" and affirmed an award of attorneys' fees in favor of the Army. A-30 (emphasis added).

In 1980, Mr. Chambers was contacted by two individuals about an administrative class action complaint that had been filed, alleging racial discrimination at Fort Bragg, an Army base in Fayetteville, North Carolina. Chambers conferred with statisticians and was assured that their analyses demonstrated statistically significant racial effects in a number of the Army's employment practices. He then agreed to represent two potential class members. Following administrative proceedings, the Equal Employment Opportunity Commission concluded that a class should be certified with respect to claims of discriminatory promotions and reprisal.

A class action complaint was filed in the United States District Court for the Eastern District of North Carolina in September 1981.[1] Sandra Blue was a class representative. Chambers and his associates met repeatedly with her and other individual members of the proposed class and collected documents from them. Between the filing of the complaint and the subsequent hearing on class certification, the plaintiffs' and defendants' counsel conducted substantial discovery.

The discovery showed that prior to 1982, applications for promotions were initially screened by a staffing specialist from Fort Bragg's Civilian Personnel Office to determine whether the candidates met the position's minimum eligibility requirements. A rating and ranking panel composed of Fort Bragg officials then evaluated the qualified candidates according to

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[1] The district court exercised jurisdiction under 28 U.S.C. 1343 (1976).

highly qualifying criteria. The panel, again assisted by the staffing specialist, then scored the applicants under four major categories: experience, awards, supervisory appraisals and "self-development." Applicants could receive points in the self-development category for training and education that were not necessarily job-related. The Army next employed its 85% and Ten Referral Rules, which limited the referrals for interview to candidates who scored within 85% of the top score, with a maximum of ten candidates.

After the filing of the class complaint, which addressed the promotion system and other employment practices, the Army changed certain features of its promotion system, including eliminating the 85% and Ten Referral Rules. It also substantially reduced the role of subjective judgments in the promotion process, about which plaintiffs had also complained. It shifted to a more objective skill-specific evaluation and eliminated consideration of certain factors unrelated to job performance.

On July 1, 1983, after extensive briefing and six weeks following a hearing, the court denied plaintiffs' motion for class certification. In order to secure relief, those who had expected to be class members were thus compelled to intervene and pursue their claims individually. These interventions had to be accomplished quickly, as the court had ordered that trial commence within one month after denying class certification. Counsel and clients concluded that forty-four individuals, including Beulah Mae Harris, should move to intervene. Discussions with the clients, documents produced in the case (including the Army's affirmative action reports), and an examination of the law led counsel to conclude that each claimant could establish at least a prima facie case of liability. A proposed complaint-in-intervention, which largely incorporated by reference the class complaint and included Harris as a plaintiff, and a motion to intervene were filed on July 5, 1983.

The court overruled the Army's objection to intervention, and on August 25 approved the filing of the complaint-in-intervention. A-82. Trial was set to commence in January 1984. Following

the filing of the complaint, counsel continued to investigate claims and conduct discovery. The plaintiffs filed final pretrial orders, and the Army filed motions affecting nearly all the plaintiffs and over one hundred claims. None addressed the merits of the Blue or Harris claims nor suggested that any claim was frivolous. A-82-86.

The first intervenor's trial started in January 1984. It was prolonged by disputes over numerous procedural, evidentiary, and trial practice issues. A-87-88. On March 14, after the conclusion of this trial, the court observed in an order that "[c]learly, counsel are extraordinarily competent and have diligently prepared for this case," but expressed dissatisfaction with the slow progress of trial. The order established comprehensive rules for future trials.

Blue's pretrial brief and exhibit list were filed on April 3. On April 17, the Army filed a motion seeking sanctions for the "abandonment of claims," allegedly demonstrated by failure to include certain claims in Blue's pretrial brief. No motion for sanctions or any other relief was made as to claims included in Blue's brief, or as to other claims that had not been specifically mentioned in the brief.

Trial was commenced on April 19. Blue's case consisted of four witnesses (including Blue) and eighteen exhibits. On April 24, at the close of Blue's case-in-chief, the Army moved under Fed. R. Civ. P. 41(b) for judgment only on certain disparate impact claims concerning the 85% Rule. An order was issued on May 14 granting the Army's Rule 41(b) motion without prejudice, subject to reconsideration if further evidence was introduced. No memorandum opinion was issued.[2]

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[2] During the later trial of an intervenor, a similar motion was made concerning claims against the 85% Rule. Reflecting the legal uncertainty surrounding this issue, the court requested supplemental briefs on the motion in light of the ruling in *Bazemore v. Friday*, 751 F.2d 662 (4th Cir. 1984), *aff'd in part & vacated in part*, 478 U.S. 385 (1986). Both sides submitted briefs reflecting substantial disagreement about the import of *Bazemore*. One month later the court decided that the motion should be granted. No memorandum opinion was issued.

On May 7, 1984, Harris moved voluntarily to dismiss her claims.[3] The Army cross-moved for sanctions against Harris based on the "bad faith abandonment" of her claims. The court granted Harris' motion with prejudice, reserving the right to later impose sanctions based on the Army's cross-motion. On June 1, the court ordered that decisions on sanctions motions would be deferred "in order for the court to accurately assess the claims and conduct of all parties." It nevertheless required prompt responses to the motions.

The Blue trial resumed on August 27, with the Army presenting its defense, which ultimately included twenty-three witnesses and twenty-two exhibits. Trial was completed on September 4. Decision was reserved, and the court requested proposed findings of fact and conclusions of law. The Army made no motion for sanctions and no further motions under Rule 41(b). After the testimony was completed in the Blue case, the Army requested that the court issue findings and conclusions on each claim as testimony was concluded. This request was denied. The court stated its intention to file draft findings under seal, but never did. On October 26, the Army submitted its proposed findings of fact and conclusions of law in the Blue case. It did not suggest that the tried claims were frivolous and made no motions directed to them.

On February 28, 1985, after the claims of six plaintiffs had been tried, the parties entered into a settlement agreement.[4] The defendants agreed to pay $75,000 (with potential offsets) in exchange for dismissal with prejudice of all claims that had not yet been tried. The agreement also provided that: the Army would continue to implement its affirmative action programs in good faith; claims heard by the court were to be adjudicated, with both parties waiving any right to appeal the rulings; and the pending motions for sanctions were to be decided by the court,

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[3] The Army had fired Harris three months earlier, and she was pursuing administrative remedies for the termination.

[4] In February 1985, Mr. Chambers withdrew his appearance as lead in-court counsel in order to accept a position as the Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc. ("LDF"). He retained overall responsibility for the litigation.

with both parties reserving the right to appeal. The court approved this agreement on March 4, 1985.

To deal with the sanction motions remaining, the court on March 4 ordered bifurcated hearings ("liability", then "damages"). A-102. It directed that the hearings focus on two issues: whether claims were frivolous or vexatious under *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), and whether claims in the final pretrial orders were abandoned in bad faith. It did not mention Rule 11, Rule 16 or section 1927.

"Liability" sanction trials consumed thirteen days in March and April 1985. Blue testified again at these hearings, and Harris testified for the first time. Again the court requested proposed findings of fact and conclusions of law. On June 6, 1985 the Army was ordered to file proof of fees and expenses incurred. On July 31, 1985, the parties entered into a final agreement dismissing all claims and all claims for sanctions, except as to Harris and Blue.

The evidence on sanctions was deemed closed as of August 23, and final submissions with respect to the Blue and Harris cases were filed on November 5, 1985 — nearly nineteen months after the commencement of the Blue trial on the merits (on which no decision had yet been rendered) and nearly eighteen months after Harris had sought to remove her case from the court's docket. Again, the Army made no sanctions motions as to the Blue claims that were tried. A-316 n.174.

Years passed. Three days after Christmas in 1987, the court released a memorandum opinion of almost 500 typewritten pages, which ultimately occupied nearly 200 pages in the Federal Supplement. The opinion was unprecedented not just in its bulk but in imposing sanctions on plaintiffs and their counsel under virtually every potential legal basis, including some bases that were first conceived by the district court.[5] In addition to awarding sanctions to the Army, the court fined plaintiffs and their counsel nearly $38,000 for the time spent on the cases by the court and

[5] *E.g.*, A-524 (finding that Fed. R. Civ. P. 16(f) proscribes frivolous claims).

its staff. The court also sua sponte invited the Army to make a motion for sanctions as to the Blue claims that were tried.[6]

While faulting plaintiffs and their counsel for pursuing what the court found were patently frivolous claims, in awarding attorneys' fees to the Army, the court observed: "The litigation presented continually challenges [sic] issues of both fact and law. The record and this opinion reveal its complexity and magnitude. . . . The sheer enormity of the task of trying a case such as this is transparent. In a legal sense, many aspects of the law governing Title VII was and is [sic] in flux." A-363.

The opinion was based on two legal principles that were erroneous. First, the district court held that to establish a prima facie case of wrongful denial of promotion under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), "some other evidence that race was a factor" must be shown under the fourth element of that test. *E.g.*, A-68-69, 245. This conclusion was based on a divided, en banc opinion of the Fourth Circuit that was not released until months after the Harris and Blue cases were sub judice.[7] Second, the district court held that when an employer advances as a defense the superior qualifications of the employee actually promoted, the plaintiff cannot prevail unless she proves her qualifications were superior.[8]

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[6] Without observing any of the procedures required by local rules, the court also adjudicated a violation by plaintiffs' counsel of the disciplinary rules for a conflict in representation the court had three years earlier found to have been satisfactorily resolved. A-450-55. It also prohibited the NAACP (which had no connection with the case) and the LDF (which was not a party) from paying any of the sanctions. A-534.

[7] *Holmes v. Bevilacqua*, 794 F.2d 142 (4th Cir. 1986) (en banc).

[8] A-248-56, 337 nn.185-86, 413. This Court's later decision in *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989), proved these holdings to be erroneous. The Court held there that the "fourth prong" of a promotion claim under *McDonnell Douglas* could be satisfied by showing that after the plaintiff was rejected the employer either continued to seek applications or filled the position with a white employee. 109 S. Ct. at 2378. The Court also held that in order to prevail a plaintiff need not prove that her qualifications were superior to those of the employee selected. *Id.*

After post-judgment motions, the court determined the fee award to the Army for the tried Blue claims and vacated the sanctions and/or disciplinary findings against two attorneys. The court denied Chambers' motion that he personally bear the sanctions imposed on all lawyers. A-579-82. The final judgment imposed the following fines and sanctions against:

> Counsel, for bad faith, and under 28 U.S.C. § 1927, Rules 11 and 16, and disciplinary rules:
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> | | | |
> |---|---|---|
> | Chambers | $34,250.00 | |
> | Sumter | 15,750.00 | |
> | Glazer | 5,000.00 | |
> | Chambers' former law firm | 1,413.62 | |
> | | | $56,413.62 |
> | Harris and Blue, for bad faith and Rule 11 (Harris only) | | 33,000.00 |
> | | | $89,413.62 |

Of this amount, $37,905 was directed to be paid to the clerk of the court.

The Fourth Circuit affirmed in part and reversed in part. A-1. It held that the district court had erred in imposing punishment under the disciplinary rules, awarding costs based on judicial salaries, sanctioning Chambers' law firm, sanctioning Sumter (a young associate who had assisted Chambers in the litigation), awarding the Army attorneys' fees incurred in connection with the sanctions hearings, and in prohibiting the NAACP and LDF from paying for any sanctions.[9] The appellate court nevertheless held that the district court had not abused its discretion in finding that sanctionable conduct occurred.[10] It rejected arguments that this finding was erroneous because plaintiffs' cases were

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[9] Glazer did not appeal the judgment against her.

[10] A-31. Although the various sanctioning authorities relied upon by the district court have disparate origins, purposes and applications, the court of appeals

(Footnote continued)

supported by prima facie evidence and because the the district court had applied incorrect law and improperly based its decision on hindsight determinations of witness credibility. The court also held that Title VII's prohibition against awarding attorneys' fees to the United States had no relevance. 42 U.S.C. §§ 2000e-5(k), 2000e-16(d) (1988) A-613-22.[11]

REASONS FOR GRANTING THE WRIT

I. Attorneys Should Not Be Subject To Sanctions Based On Hindsight Determinations Of Witness Credibility

Since the 1983 amendments to Rule 11, litigants and courts have shown increasing zeal for seeking and imposing sanctions. Courts have become demonstrably more willing to punish litigants for exercising rights heretofore thought unexceptionable, like defeating summary judgment by pointing to issues of motive and credibility, and having a day in court to look the adversary in the eye and subject the proof to cross-examination and other tests.

In this, as in many cases, credibility was a central issue. The court of appeals essentially acknowledged that plaintiffs had stated prima facie claims of employment discrimination, so the legal sufficiency of the plaintiffs' cases was not in doubt when judged against the correct law. Only after resolving numerous questions of credibility against the plaintiffs (albeit neither uniformly nor consistently), did the district court decide that some claims were frivolous. By affirming this decision, the court of

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elected not to "dissect the particulars of each theory as applied to each of the district court's findings of improper conduct." A-14. Instead, the court circuitously observed that it would "examine the basic question of whether the actions of plaintiffs and their counsel constituted sanctionable conduct." *Id.*

[11] On remand, the district court entered judgment against Chambers in the amount of $20,767.07, against Blue in the amount of $11,846.81, and against Harris in the amount of $15,846.00. A-605.

appeals punished the lawyers for seeking the very credibility determinations that the adversary system is designed to provide.

This is not the only decision of a court of appeals sanctioning a lawyer for misjudging witnesses' credibility. *Lemaster v. United States*, 891 F.2d 115, 121 (6th Cir. 1989). The decisions here and in *Lemaster* conflict with the position of the Second Circuit. In *Oliveri v. Thompson*, 803 F.2d 1265, 1277-78 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987), the Second Circuit held that sanctions were inappropriate on precisely this ground: "Section 1927 was not intended to require an attorney to pass judgment on the credibility of his client on pain of a monetary sanction in the form of paying adversaries' attorneys' fees should he evaluate that credibility contrary to the district court's view."[12]

This Court ruled similarly in *Runyon v. McCrary*, 427 U.S. 160 (1976). The plaintiffs there claimed that the defendants had litigated in bad faith, citing conflicts in testimony that the district court had resolved against the defendants and the district court's characterization of certain defendants' testimony as "unbelievable." *Id.* at 183. Rejecting this assertion of bad faith, the Court held: "Faults in perception or memory often account for differing trial testimony, but that has not yet been thought a sufficient ground to shift the expense of litigation." *Id.* at 184.

In upholding a finding of bad faith where there was evidence sufficient to establish a prima facie case under *McDonnell Douglas*, the Fourth Circuit also put itself in conflict with the Third Circuit, which has held to the contrary. *Williams v. Giant Eagle Markets, Inc.*, 883 F.2d 1184 (3d Cir. 1989). By doing so,

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[12] In an analogous context, several courts of appeals have held that where the United States has failed to prevail because of adverse credibility determinations, its position is nonetheless "substantially justified" (a standard more stringent than non-frivolousness) for purposes of the Equal Access to Justice Act. 28 U.S.C. § 2412(d) (1988). These decisions, too, are in conflict with the Fourth Circuit's approach. *E.g.*, *Mester Mfg. Co. v. United States Immigration & Naturalization Serv.*, 900 F.2d 201 (9th Cir. 1990); *Charter Management, Inc. v. NLRB*, 768 F.2d 1299 (11th Cir. 1985); *Temp Tech Indus. v. NLRB*, 756 F.2d 586 (7th Cir. 1985).

the Fourth Circuit has severely undercut the vitality of the *McDonnell Douglas* model, the foundation for countless discrimination claims. If counsel risks sanctions for utilizing this model in a case where credibility questions are determinative, the model will become a lifeless husk.

Credibility determinations are for the trier of fact, not counsel, to make. Counsel should not be subject to sanction for pursuing legally viable claims on the theory that he or she ought to have realized that evidence would not be credited at trial — a matter which is rarely predictable or confirmable. It is respectfully submitted that no sanctions power may be properly invoked in these circumstances.

A. The Sanctions Below Rested Upon Credibility Determinations

The district court's conclusions about frivolousness were based on witness credibility. The court believed that the plaintiffs were not credible witnesses.[13] This belief flowed in part from assessments of the credibility of the Army's witnesses. For example, based on the trial testimony of Army employees, enlisted personnel and officers, the lower court found that Blue was unprofessional and discourteous, among other things. A-140-41. Documentary evidence, however, showed satisfactory annual performance ratings and multiple letters of commendation.

Many factual issues involved "swearing matches," where plaintiffs and defendant offered differing versions of events not objectively verifiable.[14] Some of the district court's credibility determinations in this respect were not uniform, others internally inconsistent. *Compare* A-189-90 (crediting Army witness over

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[13] *E.g.*, A-142, 147 n.83, 156 n.85, 161, 179, 187, 192. The opinion is riddled with qualified observations that plaintiffs presented "no *credible* evidence." *E.g.*, A-410 (emphasis added).

[14] *E.g.*, A-140, 145, 155, 159, 161, 183-84, 190-91, 215 n.117, 329 n.181, 441 n.247, 447-48.

plaintiff's witness) *with* A-70 n.7. (same plaintiff's witness was "entirely credible"). Although the court resolved nearly all of these contests against the plaintiffs, it found some of the plaintiffs' witnesses entirely credible, and questioned the objectivity or veracity of some of defendant's witnesses.[15] The district court found that some of Harris' claims were not frivolous, claims which depended in part upon Harris' testimony, and that some of Blue's testimony was credible.[16]

The court of appeals' decision rested heavily on the district court's determinations of credibility, as well as its own de novo observations about whether plaintiffs produced "credible evidence." A-20, 29, 31-33. Neither court explained, though, how counsel was supposed to predict which testimony the district court would ultimately choose to believe or why counsel was obligated to disbelieve clients whose claims had documentary support. The law of sanctions should require no such prediction or obligation.[17]

B. Credibility Determinations Are An Improper Basis For Imposing Sanctions

In *Christiansburg*, this Court specifically disapproved of imposing sanctions based on such hindsight determinations:

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[15] *E.g.*, A-70, 156, 184 n.92. Certain proceedings occurred before a magistrate, who had found the testimony of some Army personnel "patently inconsistent" with the evidence.

[16] A-141, 444. The district court stated that the testimony of the plaintiffs was "at times, patently perjurious." A-495. The only testimony specifically identified as such was Harris' testimony concerning her reasons for withdrawing her claims. A-402.

[17] The district court devoted only two paragraphs to a prospective analysis of the claims, and concluded that the claims were "apparently pursued without objective thought." A-520. It failed to point to specific documents or deposition testimony that should have led the lawyers to conclude at the close of discovery that the plaintiffs' claims were frivolous.

> [I]t is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most air-tight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial.

434 U.S. at 421-22. The Rule 11 advisory committee similarly cautioned that the "rule is not intended to chill an attorney's enthusiasm or creativity in pursuing *factual* or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable *at the time* the pleading, motion, or other paper is signed."[18]

Sanctioning the failure to foresee credibility determinations not only violates the principle that claims are not to be judged in hindsight, but misperceives the role of the attorney. Forcing an attorney to "adopt the role of the judge or jury to determine the facts" undermines the client's right to "zealous and loyal advocacy."[19] This Court and other courts of appeals have thus held

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[18] Fed. R. Civ. P. 11 advisory committee's note (emphasis added); *see Hughes v. Rowe*, 449 U.S. 5 (1980) (failure to prevail is not the test of frivolousness; detailed consideration given to claims by lower courts was itself evidence of lack of frivolity); *LeBeau v. Libbey-Owens-Ford Co.*, 799 F.2d 1152, 1160 (7th Cir. 1986) (reversing award of sanctions because "too much reliance [was] placed on the facts as found at trial to support a finding that the suit should not have been brought"); *Jones v. Texas Tech. Univ.*, 656 F.2d 1137, 1146 (5th Cir. 1981) (same); *cf. Neitzke v. Williams*, 109 S. Ct. 1827, 1833-34 (1989) (an action may be dismissed for failure to state a claim and yet not be so "frivolous" that it should never have been brought).

[19] *Nix v. Whiteside*, 475 U.S. 157, 189 (1986) (Blackmun, J., concurring) (citation omitted); *cf. Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (courts

(Footnote continued)

in similar contexts that attorneys should not be subject to sanctions merely because the trial court has found witnesses incredible.[20] Courts have adhered to this principle even where a plaintiff's case is based primarily on her own testimony[21] and even where there is other evidence in the record that is inconsistent with the plaintiff's testimony.[22] By forcing counsel to make credibility guesses under penalty of sanction, the court of appeals ruling "blurs the roles of attorneys and finders of fact." *Greenberg v. Sala*, 822 F.2d 882, 886-87 (9th Cir. 1987).

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forbidden to make credibility determinations on summary judgment); *Hardin v. Pitney-Bowes, Inc.*, 451 U.S. 1008, 1010 (1981) (Rehnquist, J., dissenting from denial of certiorari) ("summary judgment simply may not be granted when such matters as the defendant's motive and intent are questioned").

[20] *Runyon*, 427 U.S. at 183; *Oliveri*, 803 F.2d at 1277-78; *District No. 8, Int'l Ass'n of Machinists v. Clearing*, 807 F.2d 618, 622 (7th Cir. 1986) (reversing Rule 11 sanction based on determination of witness credibility); *cf. Nix*, 475 U.S. at 190 (Stevens, J. concurring) ("Even a pebble that seems clear enough at first glance may take on a different hue in a handful of gravel.").

[21] *Glymph v. Spartanburg Gen. Hosp.*, 783 F.2d 476, 480 (4th Cir. 1986) ("[Plaintiff's] case depended almost wholly on her oral testimony . . . , and while it is true that the hospital presented a strong defense . . . , which was accepted by the district court, we do not think that such cases should subject unsuccessful plaintiffs to the award of attorneys' fees . . . ."); *Sullivan v. School Bd. of Pinellas County*, 773 F.2d 1182, 1990 (11th Cir. 1985) (reversing imposition of sanctions where plaintiff's refutation of defendants' criticisms of her performance consisted primarily of her own testimony).

[22] *See Little v. Southern Elec. Steel Co.*, 595 F.2d 998, 1002 (5th Cir. 1979) (award to defendant under *Christiansburg* reversed despite district court's conclusion that "plaintiff's testimony was so inconsistent and contradictory throughout as to suggest strongly that he was lying under oath"); *Torres v. Oakland County*, 758 F.2d 147 (6th Cir. 1985) (sanctions refused even though the plaintiff had admitted during her deposition that she did not feel she was discriminated against, but then contradicted this testimony at trial); *EEOC v. Pet, Inc.*, 719 F.2d 383, 386 n.5 (11th Cir. 1983) (claim not frivolous even though affidavits of plaintiffs were of questionable accuracy and conflicted with subsequent deposition testimony).

C. The Result Undermines Title VII Substantive Law

Although sanctioning lawyers based on credibility determinations should be disapproved in any context, it is particularly ill suited to the *McDonnell Douglas* standard of proof, which governs not only Title VII actions but other statutory remedies for discrimination. As the Fourth Circuit essentially recognized, there was sufficient evidence supporting Harris' and Blue's allegations to establish prima facie claims of discrimination under *McDonnell Douglas* and its progeny.[23] Plaintiffs' prima facie showing would entitle them to judgment as a matter of law unless the defendant were to introduce *admissible evidence* of legitimate non-discriminatory reasons for the challenged actions. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). "An articulation not admitted into evidence will not suffice." *Id.* at 255 n.9.

Counsel should not, under penalty of sanctions, be forced to presume that a defendant will fulfill its burden. *Williams v. Giant Eagle Markets, Inc.*, 883 F.2d 1184 (3d Cir. 1989). The employer may waive a defense, a witness may fail to appear, or the court may reject an employer's witness as incredible. *See id.* at 1192-93. Thus, even if counsel knew that there was an "unchallengeable defense at the time he commenced this suit, that fact would not [be] sufficient to support a finding of bad faith." *Id.* at 1193 (citing *Ford v. Temple Hosp.*, 790 F.2d 342 (3d Cir. 1986)). In holding that counsel could be found guilty of bad faith where a prima facie case could be made, the Fourth Circuit's determination is squarely at odds with *Williams*. More importantly, the holding forces abandonment of discrimination claims in a nascent stage. It is simply "beyond cavil that Congress did not intend that a defense against a prima facie act of racial discrimination be decided in the lawyer's office (by his refusal to bring the suit, especially if inhibited by the fear of personal liability) rather than by affording the employee his day in court." *Lewis v. Brown*

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[23] A-18-19. The district court failed to recognize the prima facie nature of many of the claims because it applied an erroneous interpretation of Title VII law. *See supra* p. 8.

& Root, Inc., 711 F.2d 1287, 1294 n.3 (5th Cir. 1983) (Tate, J., dissenting).[24]

Even if an attorney is forced under threat of punishment to assume that the employer will rebut a prima facie showing, the issue of pretext will remain. This Court has repeatedly stressed that proof of pretext may take a variety of forms.[25] It may be sufficient for the plaintiff to rely on the prima facie showing and a cross-examination of the defendant's witnesses. *Burdine*, 450 U.S. at 248 n.10. Indirect proof of pretext also may be found in the employer's past treatment of the employee, or the employer's "general policy and practice with respect to minority employment." *McDonnell Douglas*, 411 U.S. at 804-05; *see Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2378 (1989). In short, there is no specific formula required to show that the "proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256.

The record here contains examples of evidence, much of which is documentary, that establish pretext:

- Harris had successfully grieved claims that she had been improperly appraised and denied a promotion on the basis of her race;

- selecting officials who purportedly made promotion decisions based on qualifications had not even reviewed the files containing these qualifications;

- on several occasions, Blue claimed that employment actions were unfair, many of which were ultimately rescinded;

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[24] Indeed, several courts have held that plaintiffs should not be sanctioned where the proof does not establish even a prima facie case. *EEOC v. Pet, Inc.*, 719 F.2d 383 (11th Cir. 1983) (per curiam); *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1141 (5th Cir. 1983); *EEOC v. Fruehauf Corp.*, 609 F.2d 434 (10th Cir. 1979), *cert. denied*, 446 U.S. 965 (1980); *Bowers v. Kraft Foods Corp.*, 606 F.2d 816, 819 (8th Cir. 1979).

[25] *Patterson*, 109 S. Ct. at 2378 (citing *McDonnell Douglas*, 411 U.S. at 804-05; *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983)).

- Blue was threatened by her supervisors for seeking assistance from her union to redress working conditions;

- employment decisions involving Blue were repeatedly infected with errors regarding her qualifications that were corrected when Blue complained;

- the Army's affirmative action plan recognized that minorities were underrepresented in many positions;

- the Army recognized that certain of its employment practices may have adversely impacted minorities.

The *McDonnell Douglas* framework envisions that credibility determinations will often be dispositive of discrimination claims, and this is precisely what occurred below. To say that lawyers acted not only frivolously, but in bad faith, in pursing such credibility determinations is to flout the opportunities for proof that *McDonnell Douglas* was designed to provide, and trammel the attorneys' ethical obligation to zealously represent the client. *Williams*, 883 F.2d at 1193.

D. The Credibility Determinations Are Tainted By Legal Errors

Finally, the district court's credibility determinations are an especially weak reed to support conclusions of bad faith or frivolity because they are plagued by legal error. Most of the plaintiffs' claims here involved promotions, and the district court erroneously believed that plaintiffs could not prevail unless they proved that their qualifications were superior to the person actually promoted.[25] This requirement is precisely contrary to this Court's later decision in *Patterson*.

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[25] The court of appeals ignored this error. It addressed only the district court's error in defining the requirements of a prima facie case, which it excused on

(Footnote continued)

The district court's judgments about credibility were undoubtedly tainted by its substantive legal error. It repeatedly faulted the plaintiffs for failing to prove that they possessed qualifications superior to employees actually selected.[27] This undeserved blame indisputably colored the district court's overall perception of their cases.

The result below is ominous for all lawyers and particularly haunting for those representing victims of discrimination. Unless remedied, the court of appeals' holding will dissuade counsel from accepting the causes of these victims. The instruments chosen "to vindicate a policy that Congress considered of the highest priority" will thereby become dull and ineffectual.[28]

II. Section 706(k) Of Title VII Bars The United States From Recovering Attorneys' Fees For Defending Against Frivolous Claims

Section 706(k) of Title VII provides that a court may "allow the prevailing party, other than [EEOC] or the United States, a reasonable attorney's fee."[29] Under *Christiansburg*, a prevailing defendant may be awarded attorneys' fees under this section

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the ground that the district court had "assumed" the plaintiffs had presented prima facie cases. A-20. In fact, the district court made such an assumption only as to a portion of the claims. A-408-35.

The Fourth Circuit's failure to reverse based on the legal error concerning qualifications conflicts with decisions in several other circuits. In *Williams*, the Third Circuit reversed a finding of bad faith because of a similar error. The district court there had erroneously held that the plaintiff was bound to disprove allegations of insubordination as part of her prima facie case. 883 F.2d at 1191-92. Other courts of appeals have granted reversals in similar circumstances. *EEOC v. St. Louis-S.F. Ry.*, 743 F.2d 739, 743 (10th Cir. 1984) (reversing award of sanctions where district court applied erroneous standard to determining prima facie case); *Plemer v. Parsons-Gilbane*, 713 F.2d 1127 (5th Cir. 1983) (reversing award of sanctions where district court erred in determining that no prima facie case had been presented).

[27] A-249, 337 n.186, 411-12, 422, 432.

[28] *Christiansburg*, 434 U.S. at 418 (citation omitted).

[29] 42 U.S.C. § 2000e-5(k) (1988). A-619. This provision is expressly made applicable to suits against the United States by *id.* § 2000e-16(d). A-622.

only where the plaintiff's underlying claim is "frivolous, unreasonable, or groundless or . . . the plaintiff continued to litigate after it clearly became so." 434 U.S. at 422; *see Roadway Express, Inc. v. Piper*, 447 U.S. 752, 762 (1980). The language in section 706(k) and its legislative history show Congress' intent to deny the United States an award of attorneys' fees on the ground that the plaintiffs' claims were "frivolous, unreasonable, or groundless."

The Fourth Circuit held, however, that a non-specific statute, court rules, and the common law could be used to accomplish the result expressly prohibited by section 706(k).[30] This holding renders meaningless an explicit Congressional prohibition and contravenes an important protection that Title VII provides for government employees. Because language similar to section 706(k) appears in other statutes precluding the United States from collecting attorneys' fees as a prevailing defendant, this ruling jeopardizes the enforcement of other important federal statutory schemes as well.[31]

The holding of the court of appeals contravenes several decisions of this Court concerning the interpretation of attorneys' fees provisions in the civil rights laws and the relationship between statutes and other legal authorities. It is also inconsistent with a decision of the District of Columbia Circuit. *Copeland v. Martinez*, 603 F.2d 981 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980).

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[30] Although the district court relied on several different sanctioning authorities, it ultimately awarded fees only with respect to claims that the Army prevailed on and only with respect to claims it found were frivolous. *See* A-356 n.202, 458, 472 (reducing fee award to the extent claims were non-frivolous).

[31] *E.g.*, 5 U.S.C. § 504(a)(1) (Administrative Procedures Act); *id.* § 7702(e)(1) (Merit Systems Protection); 29 U.S.C. § 794a (Rehabilitation Act of 1973); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, §§ 107, 211, 505, 104 Stat. 327 (1990). The holding also implicates the statutes listed in 42 U.S.C. § 1988 (1988) (including 42 U.S.C. §§ 1981, 1982, 1983, 1985, 1986, and Title VI) to the extent that the United States may be named as a defendant under those statutes.

Although Title VII did not originally permit suits against the United States, in 1972 Congress extended it to cover federal employees. *Library of Congress v. Shaw*, 478 U.S. 310, 319 (1986). In amending the law, Congress determined that only certain provisions in Title VII would apply in suits by federal employees, including the attorneys' fees provision in section 706(k). 42 U.S.C. § 2000e-16(d). Through this incorporation, Congress prevented the United States from recovering fees under section 706(k) as a prevailing defendant. *Butler v. USDA*, 826 F.2d 409, 414 (5th Cir. 1987).

Congress later expressly indicated that the prohibitory language used in section 706(k) was also meant to prevent awards of attorneys' fees to the United States as a prevailing defendant under any other thesis or hypothesis. In enacting the Civil Rights Attorney's Fees Act of 1976 (now codified at 42 U.S.C. § 1988) (A-613), Congress utilized the same "other than the United States" language found in Title VII.[32] Congress specifically intended to bar the United States from recovering attorneys' fees as a prevailing defendant not just under section 1988 itself but under any other authority. Representative McClory expressed the understanding that "the United States is excluded from any attorneys' fees under any thesis or under any hypothesis that we might present with regard to this legislation." 122 Cong. Rec. 35,116 (1976).[33] In subsequent colloquy, Representative Drinan, a floor leader of the House bill, again made this intent clear:

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[32] This section provides that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

[33] *Id.* at 35,118 (emphasis added); *see Awarding of Attorneys' Fees: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Comm.*, 94th Cong., 1st Sess. 176-77 (1975) (remarks of Rex E. Lee, Assistant Attorney General) (bill that became section 1988 "applies to all plaintiffs or defendants except to the United States to the extent that it is a prevailing party"); *id.* at 53 (remarks of Rep. Drinan) ("[U]nder these bills the Federal government could never recover its attorneys fees.").

> MR. WHITE. . . . Does this act we are attempting to pass now supersede the court decisions? In other words, would the defendant get an equal opportunity to receive attorneys fees, or is the defendant who prevails going to be limited as to whether or not there is a suit brought maliciously or in harassment or with other qualifying features?
>
> MR. DRINAN. If the gentlemen will yield, I will state *the U.S. Government may not have attorney fees awarded. In other cases*, it belongs in the proper discretion of the judge. If the suit is of a vexatious and harassing nature, the defendant should be given his reasonable attorneys fees. I think it is all carefully regulated by a body of law which goes back at least 50 years . . . .[34]

The congressional statements in 1976 bear directly on the meaning of section 706(k). As a general matter,

> [s]ubsequent statements of Congress about what it meant years earlier in enacting a law are "entitled to great weight in statutory construction." . . . Here we have Congress at its most authoritative, adding complex and sophisticated amendments to an already complex and sophisticated act. Congress is not merely expressing an opinion on a matter which may come before a court but is acting on what it understands its own prior acts to mean.[35]

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[34] This Court in other contexts has specifically relied upon Rep. Drinan's remarks concerning the passage of section 1988. *E.g.*, *Evans v. Jeff D.*, 475 U.S. 717, 730 n.18, 732 n.22 (1986); *Maine v. Thiboutot*, 448 U.S. 1, 9-10 (1980). Lower courts have done so in the Title VII context. *See Thornberry v. Delta Air Lines, Inc.*, 676 F.2d 1240, 1244 (9th Cir. 1982), *vacated on other grounds*, 461 U.S. 952 (1983).

[35] *Bell v. New Jersey*, 461 U.S. 773, 785 n.12 (1983) (citations omitted); *e.g.*, *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969).

Resort to section 1988's legislative history is particularly necessary because Congress specifically intended that section 1988 and section 706(k) have the same meaning. S. Rep. No. 1011, 94th Cong., 2d Sess. 2-6, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5909-13; H.R. Rep. No. 1558, 94th Cong., 2d Sess. 5-8 (1976). Thus, in *Roadway Express* the Court stated that, for purposes of determining the propriety of an attorneys' fees award in favor of a prevailing defendant, sections 706(k) and 1988 "may be considered to have the same substantive content. They authorize fee awards in identical language, and Congress acknowledged the close connection between the two statutes when it approved § 1988." 447 U.S. at 758 n.5 (citations omitted). Again in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980), the Court relied on the legislative history of section 1988 in construing section 706(k), noting that the two statutes were "similar in purpose and design."[36]

Thus, as a whole, the language and subsequent legislative history of section 706(k) reflect that the United States may not recover its attorneys' fees in Title VII cases, even if the plaintiffs' claims are frivolous. In addition, assigning pre-emptive effect to section 706(k) follows general principles of statutory interpretation. This section is part of an exclusive and comprehensive statutory scheme governing employment discrimination claims against the federal government. As such, it excludes the operation of other general statutes.[37] Thus, a non-specific statute, such as 28

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[36] 447 U.S. at 70 n.9. These rulings are consistent with other decisions of the Court dictating that attorneys' fees statutes with similar language should be given uniform interpretations. *Independent Fed'n of Flight Attendants v. Zipes*, 109 S. Ct. 2732, 2735 n.2 (1989) ("fee-shifting statutes' similar language is 'a strong indication' that they are to be interpreted alike") (citation omitted); *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983) (opinion stated its applicability to all fee statutes with the same language); *Northcross v. Board of Educ.*, 412 U.S. 427, 428 (1973) (applying Title II attorneys' fees standard to desegregation legislation, noting similar language and purpose of two statutes).

[37] *Brown v. General Services Admin.*, 425 U.S. 820, 832, 834 (1976); *see Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 375-78 (1979). The Court in *Brown* specifically noted that Title VII "govern[s] such issues as . . . attorneys' fees." 425 U.S. at 832.

U.S.C. § 1927, cannot be read to authorize an award of attorneys' fees to the United States for defending a "frivolous" case when Title VII would prohibit such an award.[38]

Similarly, a comprehensive statutory scheme cannot be nullified by a general rule of civil procedure. In *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), for example, the Court rejected a construction of Fed. R. Civ. P. 54(d) that would have allowed a recovery of costs beyond those specified by the comprehensive designations in the Judicial Code. 482 U.S. at 445. Likewise, neither Rule 11 nor Rule 16(f) of the Federal Rules of Civil Procedure can be utilized to award attorneys' fees in circumstances where Title VII would prohibit such an award.[39] Nor is there any evidence that the drafters of Rule 11 or Rule 16 intended to displace attorneys' fees provisions in comprehensive statutory schemes. Even if present, such an intent would be ineffectual under the Rules Enabling Act. 28 U.S.C. § 2072(b) (1988).

Finally, section 706(k) also displaces any right of the United States to recover fees here under the common law. Congress can restrict the ability of the courts to award attorneys' fees in the exercise of their inherent power.[40] This Court has held that it

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[38] *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) ("[W]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.") (citation omitted).

[39] *See United States v. McPherson*, 840 F.2d 244, 246 (4th Cir. 1988) (attorneys' fees provision in Internal Revenue Code pre-empts Rule 11); 2A J. Moore, *Moore's Federal Practice* ¶ 11.02[3] (1987) (more closely tailored statutory provisions should govern to the exclusion of Rule 11). Petitioner understands that a similar issue has been raised before this Court concerning the pre-emptive effect of the attorneys' fees provision in the Federal Copyright Act, 17 U.S.C. § 505 (1988). Brief for Amicus Curiae Public Citizen, *Business Guides, Inc. v. Chromatic Communications Enters.*, No. 89-1500 (U.S. Aug. 20, 1990).

[40] *Hall v. Cole*, 412 U.S. 1, 9 (1973); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 249 (1975).

should not make "major inroads on a policy matter that Congress has reserved for itself" and that the redistribution of litigation costs is the province of the legislature. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 269, 271 (1975). The legislative history of the civil rights attorneys' fees statutes shows that such a limitation is contained in Title VII. This result, too, is consistent with the pre-emptive effect of a comprehensive statutory scheme.[41]

In *Christiansburg*, a unanimous Court observed with respect to section 706(k) that had "Congress provided for attorneys' fee awards only to successful plaintiffs, an argument could have been made that the congressional action had pre-empted the common law."[42] In section 706(k), Congress prohibited fee awards to the United States in any capacity – plaintiff or defendant. The inference created by this prohibition and recognized by the Court in *Christiansburg* is also confirmed by the legislative history. *See supra* p. 21-22. Thus, the common law "bad faith" exception cannot justify a result forbidden by section 706(k).

This determination would not unduly limit the power of district courts to control the acts of government-employee plaintiffs and their counsel in Title VII actions. It would prevent only fee-shifting in the case of frivolous claims. Courts would retain the full panoply of sanctions unrelated to attorneys' fees (censure, disciplinary proceedings, dismissal, and contempt) as well as fee

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[41] *See Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 719 (1967) (because the Lanham Act "meticulously detailed the remedies" available to a plaintiff whose trademark has been infringed, the Court inferred a congressional intent to preclude a common law award of attorneys' fees).

[42] 434 U.S. at 419 n.13 (citing *Byram Concretanks, Inc. v. Warren Concrete Prods. Co.*, 374 F.2d 649, 651 (3d Cir. 1967)). In *Warren*, the court held that under the Clayton Act a defendant could not be awarded attorneys' fees based on the "bad faith" exception to the American Rule. It noted that the statute in question provided for attorneys' fees only to a prevailing "plaintiff," as opposed to other statutes that allowed such fees awards to the "prevailing party."

awards for particular acts of misconduct unrelated to the merits of the litigation (*e.g.*, Fed. R. Civ. P. 37).

Such a result is also consistent with the overall purpose of Title VII – to encourage victims of discrimination to seek appropriate redress. In litigating against their employer, government employees suffer disadvantages relative to their private-sector counterparts.[43] Denying awards of attorneys' fees to the government as a prevailing defendant helps to offset this disadvantage.

The Fourth Circuit's analysis of this issue was truncated. The court erroneously viewed *Copeland v. Martinez*, 603 F.2d 981 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980), as resolving the issues. A-21-22.[44] In *Copeland*, the court considered only the issue of whether section 706(k) pre-empted an award under the "bad faith" exception to the American Rule. Although

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[43] Unlike private sector employees, federal employee complainants are not mere private attorneys general; they are the only attorneys general under the enforcement scheme . . . . Suits in behalf of federal employees by the Attorney General or EEOC are not authorized against federal agencies. Indeed, the Attorney General is frequently counsel for the other side. Also unlike private sector employees, federal employees must first bring their employment discrimination grievances, not to an independent state or local administrative body or to EEOC, but to the very agency about whose practices they are complaining.

Parker v. Califano, 561 F.2d 320, 331 (D.C. Cir. 1977) (citations omitted). Government employees also face barriers resulting from sovereign immunity that private sector plaintiffs do not confront. *E.g.*, *Library of Congress v. Shaw*, 478 U.S. 310 (1986).

[44] The court also cited to *Butler v. USDA*, 826 F.2d 409, 414 (5th Cir. 1987). The Fifth Circuit there agreed with the result in *Copeland* without considering the supervening decisions of this Court concerning the uniform interpretation of fee-shifting statutes or otherwise augmenting *Copeland's* analysis of the issue. The statements in *Butler* on this issue are dicta because the court found that there was no evidence of bad faith. 826 F.2d at 414. The court thus reversed an award of fees to the United States, even though the lower court had found "no evidence whatever" to support plaintiff's claim. *Id.* at 410.

it observed that the plaintiff's argument there was "rather plausibl[e]" and presented a close question, the court concluded that under limited circumstances section 706(k) would not bar an award of attorneys' fees to the United States for bad faith litigation. 603 F.2d at 985, 988, 991.

The *Copeland* court dismissed the remarks of Representatives Drinan and McClory noted above, terming them only "secondarily authoritative." *Id.* at 988 (citation omitted). Since *Copeland* was decided (in mid-1979), however, this Court has repeatedly emphasized that fee shifting statutes with similar language should be given a uniform construction. *See supra* p. 23. This principle justifies giving the 1976 legislative history far greater weight than did the *Copeland* court.

But even if *Copeland* was correctly decided, it does not support the result below. The court there stated that an award under the "bad faith" exception would be permitted in the face of section 706(k) only upon "proof of malice *entirely apart* from inferences arising from the possibly frivolous character of a particular claim." 603 F.2d at 991 (emphasis added). It reasoned:

> Only in this manner would we assure a sensible distinction between the contents of the equitable and statutory exceptions to the American rule. If, as seems probable, Congress chose to exclude the United States from the statutory "prevailing party" recovery in all cases, we are obliged to observe closely such a distinction.

Id. Thus, *Copeland* actually proscribes what occurred in this case: using the "bad faith" exception to evade section 706(k) by fee-shifting on frivolity grounds. The district court here imposed sanctions based on its view of the merits of the case, and sanctioned only for claims that it found to be frivolous. *See supra* p. 20 n. 30.[45] There was, as *Copeland* required, "no proof of malice

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[45] The "finding" made by the district court with respect to the bad faith of counsel was:

(Footnote continued)

entirely apart" from inferences derived from the court's assessment of the merits.

Thus, the Fourth Circuit's holding is contrary not only to the language and legislative history of section 706(k) but to rulings of this Court and another court of appeals. Because the language at issue affects a number of federal statutes and awards of attorneys' fees as sanctions have become increasingly common, review by this Court is desirable as a means of explicating and harmonizing these important concepts.

> As for plaintiffs' counsel, they had the responsibility to ascertain and assess the facts in light of the generally discernible legal standards for determining unlawful discrimination under Title VII. Counsel, experienced in the field, have been trained to make this legal analysis and reach a rational conclusion about the merits of plaintiffs' numerous claims. If this had been done to any professional degree, it is inconceivable that many of plaintiffs' claims would have been filed and clearly none would have been maintained after the close of discovery.

A-498. Neither the district court nor the court of appeals pointed to any evidence as establishing "malice" on the part of counsel.

CONCLUSION

Petitioner requests that a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-1364

SANDRA L. BLUE,

Plaintiff-Appellant,

and

MATTIEBELLE C. HARRIS; SAMUEL P. SHEPPARD; EDWARD R. HUMPHREY; ROBERT L. EVANS; BEULAH MAE HARRIS; LEONETTA BIBBY; ANNETTE TODD; WILLIAM KINCY; JAMES T. LOVE; MANUEL EARLY; BERNARD FIELDS; BETTY REID; LYNN SILER; LELIA WALKER; THELMA CURRY; JOHN SMITH; JAMES N. FLEMING; GERALDINE BALLEW; ROBERT BRONSON; OMIE WHITE; CARLTON GILES; EDITH B. McMILLAN; MITCHELL McKELLER: CAROL J. ANDERSON; VEOLA McLEAN; ALICIA CHISHOLM; KING S. CAMERON; JEANE HENDON; JOYCE MALONE; DEBORAH McMILLAN; DORIS TURNER; VIOLET HENDERSON; NANCY ALEXANDER; CATHERINE GUTIERREZ; NANCY McGLONE; JESSIE WILLIAMS; DIANNE SHEPPARD; LEONZA LOFTIN,

Plaintiffs,

versus

UNITED STATES DEPARTMENT OF THE ARMY; JOHN O. MARSH, JR., Secretary, U. S. Department of the Army,

Defendants-Appellees.

No. 88-1376

BEULAH MAE HARRIS,

Plaintiff-Appellant,

and

MATTIEBELLE C. HARRIS; SAMUEL P. SHEPPARD; EDWARD R. HUMPHREY; ROBERT L. EVANS; LEONETTA BIBBY; ANNETTE TODD; WILLIAM KINCY; JAMES T. LOVE; MANUEL EARLY; BERNARD FIELDS; BETTY REID; LYNN SILER; LELIA WALKER; THELMA CURRY; JOHN SMITH; JAMES N. FLEMING; GERALDINE BALLEW; ROBERT BRONSON; OMIE WHITE; CARLTON GILES; EDITH B. McMILLAN; MITCHELL McKELLER; CAROL J. ANDERSON; VEOLA McLEAN; ALICIA CHISHOLM; KING S. CAMERON; JEANE HENDON; JOYCE MALONE; DEBORAH McMILLAN; DORIS TURNER; VIOLET HENDERSON; NANCY ALEXANDER; CATHERINE GUTIERREZ; NANCY McGLONE; JESSIE WILLIAMS; DIANNE SHEPPARD; LEONZA LOFTIN; SANDRA L. BLUE,

Plaintiffs,

versus

UNITED STATES DEPARTMENT OF THE ARMY; JOHN O. MARSH, JR., Secretary, U. S. Department of the Army,

Defendants-Appellees.

No. 88-1377

In Re: FERGUSON, STEIN, WATT, WALLAS & ADKINS, P.A.,

Appellant,

MATTIEBELLE C. HARRIS; SAMUEL P. SHEPPARD; EDWARD R. HUMPHREY; ROBERT L. EVANS; BEULAH MAE HARRIS; LEONETTA BIBBY; ANNETTE TODD; WILLIAM KINCY; JAMES T. LOVE; MANUEL EARLY; BERNARD FIELDS; BETTY REID; LYNN SILER; LELIA WALKER; THELMA CURRY; JOHN SMITH; JAMES N. FLEMING; GERALDINE BALLEW; ROBERT BRONSON; OMIE WHITE; CARLTON GILES; EDITH B. McMILLAN; MITCHELL McKELLER: CAROL J. ANDERSON; VEOLA McLEAN; ALICIA CHISHOLM; KING S. CAMERON; JEANE HENDON; JOYCE MALONE; DEBORAH McMILLAN; DORIS TURNER; VIOLET HENDERSON; NANCY ALEXANDER; CATHERINE GUTIERREZ; NANCY McGLONE; JESSIE WILLIAMS; DIANNE SHEPPARD; LEONZA LOFTIN; SANDRA L. BLUE,

Plaintiffs,

versus

UNITED STATES DEPARTMENT OF THE ARMY; JOHN O. MARSH, JR., Secretary, U. S. Department of the Army,

Defendants.

No. 88-1378

In Re: GERALDINE SUMTER,

Appellant,

MATTIEBELLE C. HARRIS; SAMUEL P. SHEPPARD; EDWARD R. HUMPHREY; ROBERT L. EVANS; BEULAH MAE HARRIS; LEONETTA BIBBY; ANNETTE TODD; WILLIAM KINCY; JAMES T. LOVE; MANUEL EARLY; BERNARD FIELDS; BETTY REID; LYNN SILER; LELIA WALKER; THELMA CURRY; JOHN SMITH; JAMES N. FLEMING; GERALDINE BALLEW; ROBERT BRONSON; OMIE WHITE; CARLTON GILES; EDITH B. McMILLAN; MITCHELL McKELLER: CAROL J. ANDERSON; VEOLA McLEAN; ALICIA CHISHOLM; KING S. CAMERON; JEANE HENDON; JOYCE MALONE; DEBORAH McMILLAN; DORIS TURNER; VIOLET HENDERSON; NANCY ALEXANDER; CATHERINE GUTIERREZ; NANCY McGLONE; JESSIE WILLIAMS; DIANNE SHEPPARD; LEONZA LOFTIN; SANDRA L. BLUE,

Plaintiffs,

versus

UNITED STATES DEPARTMENT OF THE ARMY; JOHN O. MARSH, JR., Secretary, U. S. Department of the Army,

Defendants.

No. 88-1379

In Re: JULIUS L. CHAMBERS,

Appellant,

MATTIEBELLE C. HARRIS; SAMUEL P. SHEPPARD; SANDRA L. BLUE; EDWARD R. HUMPHREY; ROBERT L. EVANS; BEULAH MAE HARRIS; LEONETTA BIBBY; ANNETTE TODD; WILLIAM KINCY; JAMES T. LOVE; MANUEL EARLY; BERNARD FIELDS; BETTY REID; LYNN SILER; LELIA WALKER; THELMA CURRY; JOHN SMITH; JAMES N. FLEMING; GERALDINE BALLEW; ROBERT BRONSON; OMIE WHITE; CARLTON GILES; EDITH B. McMILLAN; MITCHELL McKELLER; CAROL J. ANDERSON; VEOLA McLEAN; ALICIA CHISHOLM; KING S. CAMERON; JEANE HENDON; JOYCE MALONE; DEBORAH McMILLAN; DORIS TURNER; VIOLET HENDERSON; NANCY ALEXANDER; CATHERINE GUTIERREZ; NANCY McGLONE; JESSIE WILLIAMS; DIANNE SHEPPARD; LEONZA LOFTIN,

Plaintiffs,

versus

UNITED STATES DEPARTMENT OF THE ARMY; JOHN O. MARSH, JR., Secretary, U. S. Department of the Army,

Defendants-Appellees.

No. 88-1380

NAACP LEGAL DEFENSE AND EDUCATION FUND, INC.,

Appellant,

and

MATTIEBELLE C. HARRIS; SAMUEL P. SHEPPARD; EDWARD R. HUMPHREY; ROBERT L. EVANS; BEULAH MAE HARRIS; LEONETTA BIBBY; ANNETTE TODD; WILLIAM KINCY; JAMES T. LOVE; MANUEL EARLY; BERNARD FIELDS; BETTY REID; LYNN SILER; LELIA WALKER; THELMA CURRY; JOHN SMITH; JAMES N. FLEMING; GERALDINE BALLEW; ROBERT BRONSON; OMIE WHITE; CARLTON GILES; EDITH B. McMILLAN; MITCHELL McKELLER: CAROL J. ANDERSON; VEOLA McLEAN; ALICIA CHISHOLM; KING S. CAMERON; JEANE HENDON; JOYCE MALONE; DEBORAH McMILLAN; DORIS TURNER; VIOLET HENDERSON; NANCY ALEXANDER; CATHERINE GUTIERREZ; NANCY McGLONE; JESSIE WILLIAMS; DIANNE SHEPPARD; LEONZA LOFTIN; SANDRA L. BLUE,

Plaintiffs,

versus

UNITED STATES DEPARTMENT OF THE ARMY; JOHN O. MARSH, JR., Secretary, U. S. Department of the Army,

Defendants-Appellees.

Appeals from the United States District Court for the Eastern District of North Carolina, at Fayetteville. James C. Fox, District Judge. (CA-80-168-3-CIV; CA-81-60-3-CIV)

Argued: March 6, 1990 Decided: September 18, 1990

Before ERVIN, Chief Judge, and PHILLIPS and WILKINSON, Circuit Judges.

Affirmed in part, reversed in part, and remanded by published opinion. Judge Wilkinson wrote the opinion, in which Chief Judge Ervin and Judge Phillips joined.

ARGUED: Bonnie Kayatta-Steingart, FRIED, FRANK, HARRIS, SHRIVER & JACOBSON, New York, New York; William Clarence McNeill, III, EMPLOYMENT LAW CENTER, San Francisco, California; George Cochran, LAW CENTER, University, Mississippi, for Appellants. Mark B. Stern, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. ON BRIEF: John Sullivan, Douglas H. Flaum, Tricia Kallett Klosk, Peter L. Simmons, FRIED, FRANK, HARRIS, SHRIVER & JACOBSON, New York, New York; Cressie H. Thigpen, Jr., Raleigh, North Carolina; Morton Stavis, CENTER FOR CONSTITUTIONAL RIGHTS, New York, New York; Stephen B. Burbank, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, Philadelphia, Pennsylvania; Georgene Vairo, FORDHAM LAW SCHOOL, New York, New York; Jerold Solovy, Laura Kaster, JENNER & BLOCK, Chicago, Illinois; Barrington D. Parker, Jr., Leslie D. Callahan, MORRISON & FOERSTER, New York, New York, for Appellants. Stuart M. Gerson, Assistant Attorney General, Robert S. Greenspan, Thomas M. Bondy, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Margaret P. Currin, United States Attorney, Raleigh, North Carolina, for Appellees.

WILKINSON, Circuit Judge:

In this case we must determine whether the district court erred in imposing sanctions on two Title VII plaintiffs, their counsel, and counsel's law firm. The court invoked a number of different yet overlapping legal theories to justify its imposition of sanctions, including Federal Rules of Civil Procedure 11 and 16, the "bad faith" exception to the American Rule, and 28 U.S.C. § 1927. In imposing the sanctions, the court ordered not only that defendant be awarded payment for court costs and attorneys' fees, but also that the court itself be reimbursed for the expenses it incurred and the time it spent presiding over the litigation. It also directed that the NAACP Legal Defense Fund not pay any part of the sanctions for the lawyers involved in the case. *Harris v. Marsh*, 679 F. Supp. 1204 (E.D.N.C. 1987). Plaintiffs, counsel, counsel's law firm, and the Legal Defense Fund challenge the propriety of the sanctions on numerous factual and legal grounds. Finding merit in some, but not all, of their contentions, we affirm in part and reverse in part the judgment of the district court.

I.

In the spring of 1980, two civilian employees at the United States Army base at Fort Bragg, North Carolina, contacted Julius Chambers, a civil rights attorney from Charlotte, North Carolina, concerning an administrative class action they had filed alleging racial discrimination at Fort Bragg. Chambers conferred with statisticians at that time and was assured that their analyses demonstrated statistically significant racial effects in a number of employment practices at Fort Bragg. He agreed to represent two potential class members in the processing of the administrative complaint. During the administrative proceedings, the EEOC Complaints Examiner concluded that a class should be certified with respect to the claims of discriminatory promotions and reprisal.

A class action complaint was filed in federal court by Chambers in September 1981 with appellant Sandra Blue as one of five class representatives. Plaintiffs maintained that the

United States Army had discriminated on the basis of race against them and other similarly situated black civilian employees at Fort Bragg with respect to numerous employment opportunities, in violation of section 717(a) of Title VII, 42 U.S.C. § 2000e-16(a). They sought back pay and injunctive and other equitable relief on behalf of themselves and the class.

The suit was the largest class action in employment discrimination ever filed against the United States Army. Hundreds of military and civilian employees were charged with racially discriminatory actions. Plaintiffs' allegations of racial discrimination were wide-ranging. They accused the Army of engaging in discriminatory practices in virtually every aspect of civilian employment: in hiring and promotion criteria, pay practices, job assignments, job performance evaluations, disciplinary actions, reductions-in-force, and numerous aspects of on-the-job treatment.

Massive discovery began in November of 1981. An estimated five million documents were produced in the course of discovery, the majority by the Army. In addition, one hundred and forty-nine depositions were ultimately filed with the court.

In January of 1983, Geraldine Sumter, a young attorney eighteen months out of law school and six months out of a judicial clerkship, joined Chamber's law firm and was assigned to this case. She was one of only two associates assisting Chambers full-time on the case. Minor research assistance was provided by several other attorneys.

Discovery ended in February 1983, and a hearing was held in May 1983 to determine whether the litigation should go forward as a class action. In July 1983 the district court denied class certification because plaintiffs had failed to meet the factual predicate necessary for certification. In late August 1983, the court permitted forty-four persons, including appellant Beulah Mae Harris, to intervene as plaintiffs.

Discovery, which had been closed, was re-opened for several months on the claims of the intervenors. Numerous pretrial motions were filed by both parties. In December 1983, the court

entered a final pretrial order disposing of these motions. Among the court's rulings in the pretrial order was its grant of the motions of eleven intervenors, not including Harris, to withdraw as plaintiffs. The motions to withdraw were filed within approximately one month after the motions to intervene. No reasons were given for the withdrawals. The pretrial order also specified the claims to be heard, witnesses to be called, exhibits to be offered, and so on, for all the original plaintiffs and the Army. Suit was thus set to go forward with thirty-eight individual plaintiffs. Trial was scheduled to begin in January 1984, with Blue to be the third plaintiff to have her claims heard.

The trial of the first plaintiff's claims began as planned in January 1984. Shortly before Blue's portion of the case was to begin in April 1984, she submitted her pretrial brief setting forth the claims she intended to try. The pretrial brief did not include a number of claims which Blue had earlier indicated she intended to litigate (as reflected in the pretrial order), and which the Army had prepared to rebut. The Army filed a motion for sanctions on the ground that Blue had abandoned the claims and in so doing had prejudiced the Army. The court took the motion for sanctions under advisement, and the remainder of Blue's claims went to trial in April 1984. Blue's case-in-chief was completed by late April, but pressing litigation and other matters required that the court recess the remainder of Blue's case for approximately four months.

Over the next few months, thirteen additional plaintiffs sought to withdraw from the lawsuit, moving for voluntary dismissal of all their claims under Fed. R. Civ. P. 41(a)(2). Harris was among the plaintiffs who sought to withdraw. The Army acquiesced in the plaintiffs' motions to withdraw, but moved for sanctions based on the waste of the Army's time in preparing for the groundless suits and on abuse of the judicial process. The district court granted the motions to withdraw, but reserved the government's sanctions motions on the abandoned claims.

Also, in July 1984, Julius Chambers assumed the position of Director-Counsel of the NAACP Legal Defense Fund, and his involvement in the case diminished significantly. In addition,

the other associate working on the case left the employ of Chambers' firm. Thus, in the middle of trial of Blue's claims, Sumter was left for all practical purposes in charge of the litigation. While Chambers did make a number of appearances before the court after July 1984, these appearances were infrequent, and it was clear that Sumter had assumed primary responsibility for the day-to-day conduct of the litigation.

Blue's trial resumed in August and ended in September 1984. The trials of the remaining plaintiffs began in September and after a break beginning in late September resumed again in late February 1985. In March 1985, the parties reached a partial settlement, according to which the Army agreed to pay all plaintiffs as a group $75,000 and to continue to implement its affirmative action program in good faith. All remaining plaintiffs whose cases had yet to be heard agreed to dismiss their claims. The court was still to adjudicate those claims which it had already heard, as well as all sanctions motions.

In March and April 1985, the court conducted extensive sanctions hearings to determine the reasons why plaintiffs had abandoned their claims and whether the claims were frivolous. It heard several weeks of testimony and argument by the parties. On July 31, 1985, the parties reached a "final agreement" nullifying and superseding the earlier settlement. Pursuant to the final agreement, the substantive claims of all plaintiffs except Blue and the sanctions motions against all plaintiffs except Blue and Harris were dropped. Blue and Harris were not included in this settlement because they declined to sign the final agreement or somehow missed their opportunity to do so. Thus, still before the court were the merits of Blue's tried claims and the government's motions for sanctions against Blue, Harris, and their counsel for their abandoned claims. Both sides submitted briefs, affidavits, and other materials on the remaining claims and sanctions motions, and final pleadings were filed in early November 1985.

In an opinion dated December 28, 1987, the district court rejected as frivolous Blue's tried claims of discrimination and awarded sanctions based on the abandoned claims against Blue,

Harris, Chambers, Sumter, Chamber's law firm, and certain other attorneys involved in the plaintiffs' representation. It ruled that the claims which Blue and Harris had dropped were frivolous, that Blue and Harris had committed perjury, and that both plaintiffs and their counsel had either entered into or maintained the baseless litigation in bad faith.

Combined sanctions totalled approximately $85,000. The sanctions were apportioned in the following manner: $17,000 against Harris, $13,000 against Blue, $30,000 against Chambers, $12,500 against Sumter, approximately $1,414 against the law firm of Ferguson, Stein, Watt, Wallas & Adkins, and the remainder against other attorneys involved in the case in lesser capacities. Sanctions were imposed on Blue under the bad faith exception to the American Rule, on Harris under both the bad faith exception and Rule 11 of the Federal Rules of Civil Procedure, and on counsel under the bad faith exception, Rules 11 and 16 of the Federal Rules of Civil Procedure, and 28 U.S.C. § 1927. The court calculated the sanctions in such a manner as to allow the Army to recoup its attorneys' fees and other expenses incurred in preparing for the abandoned claims, and also to allow the court to recover for the salaries of the court staff and other expenses of the court in resolving the litigation. The court also forbade the NAACP Legal Defense Fund from paying any of the sanctions for the attorneys. In addition, the court found that counsel had committed an ethical violation in persisting in the representation of two clients with conflicting interests. The court reprimanded and fined counsel for this behavior.

On motion for reconsideration, the district court rejected Sumter's argument that she should not be sanctioned because she was merely an associate working at the direction of Chambers, the leading partner in her law firm. The court found that Sumter was plaintiffs' chief counsel at trial while much of the misconduct occurred. However, the court did vacate the sanctions with respect to one attorney who played only a minor role in plaintiffs' representation. In addition, the court considered the Army's motion that sanctions be granted on the basis of Blue's pursuit of frivolous claims that were actually tried by

the court, in addition to the sanctions which had already been imposed for the abandoned claims. The court granted such sanctions against Blue, Chambers, and Sumter in the combined amount of $10,000.

Blue, Harris, Chambers, Sumter, the law firm, and the NAACP Legal Defense Fund all appeal.

II.

A myriad of different legal theories exist upon which sanctions can be imposed on attorneys and parties for engaging in improper conduct. Here, the district court relied upon four such theories in awarding sanctions: Rules 11 and 16 of the Federal Rules of Civil Procedure, the "bad faith" exception to the American Rule, and 28 U.S.C. § 1927. While these legal theories approach attorney and party misconduct from different perspectives and have differing standards, all share the common goal of the efficient litigation of meritorious suits and the deterrence of suits so patently meritless that their pursuit constitutes an abuse of the judicial system.

A brief review of the sanctions theories invoked by the district court reveals their similarities and differences. Rule 11 mandates that every pleading, motion, or other paper filed with the court be the product of a "reasonable inquiry" on the part of the attorney or party signing the document, and that the document be "well grounded in fact and. . .warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it. . .not [be] interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Fed. R. Civ. P. 11. Rule 16 provides for sanctions "if a party or party's attorney fails to participate in good faith" in a pretrial conference. Fed. R. Civ. P. 16(f). Under the bad faith exception to the American Rule, a court may award attorneys fees against a losing party or attorney who has " 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.' " *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59 (1975) (quoting *F.D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974)) Finally,

28 U.S.C. § 1927 provides that "[a]ny attorney. . .who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

It is clear from the legal standards through which these sanctions operate that there can in many cases be significant overlap among them. In a proper case, several of the theories can be invoked to justify punishment of the same conduct. *See Blair v. Shenandoah Women's Center, Inc.*, 757 F.2d 1435, 1437 (4th Cir. 1985). The district court here took just such an approach, holding much of the conduct it found improper to be punishable under several of the theories. Rather than dissect the particulars of each theory as applied to each of the district court's findings of improper conduct, we think it more straightforward to examine the basic question of whether the actions of plaintiffs and their counsel in pursuit of this lawsuit in fact constituted sanctionable conduct.

III.

It is important at the outset to place this case in proper context. We are mindful of the role that federal courts have played in the struggle for equal opportunity under law. It was in the federal courtroom that litigation brought to life the abstract guarantees of racial justice. That development has not been a static one. Many rights and remedies once thought novel and unprecedented won the approval of the Supreme Court of the United States. The most important of these cases were, certainly at the time, the subject of the most intense debate and controversy. *See, e.g., United Steelworkers of America v. Weber*, 443 U.S. 193 (1979); *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978); *Runyon v. McCrary*, 427 U.S. 160 (1976); *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973); *Swann v. Charlotte-Mecklenberg Bd. of Ed.*, 402 U.S. 1 (1971); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Green v. County School Bd. of New Kent County, Va.*, 391 U.S. 430 (1968); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Brown v. Board of Ed.*, 347 U.S. 483 (1954); *Sweatt v. Painter*, 339 U.S. 629 (1950).

At no time during this passage was the courtroom debate, for all its intensity, stilled by the specter of sanctions. The fact that a civil rights litigant pressed a legal position which courts had previously rejected was not thought to constitute a species of sanctionable conduct. If it had been, the parties and counsel who in the early 1950s brought the case of *Brown v. Board of Ed.*, 347 U.S. 483 (1954), might have been thought by some district court to have engaged in sanctionable conduct for pursuing their claims in the face of the contrary precedent of *Plessy v. Ferguson*, 163 U.S. 537 (1896). The civil rights movement might have died aborning.

The case before us was brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The Supreme Court has cautioned district courts not to casually impose sanctions on Title VII plaintiffs and their counsel:

> [I]t is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most air-tight claims, for seldom can a prospective plaintiff be sure of ultimate success.

Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421-22 (1978).

At the same time, however, no litigant can be allowed to abuse federal courts or opposing litigants with impunity. Like all other litigants, civil rights litigants face the prospect of sanctions if they pursue patently frivolous lawsuits. "Racial or religious discrimination is odious but a frivolous or malicious charge of such conduct . . . is at least equally obnoxious." *Carrion v. Yeshiva Univ.*, 535 F.2d 722, 728 (2d Cir. 1976). Equality under law means that the rules of law, including those concerning sanctions, apply to everyone. *See Oliveri v. Thompson*, 803 F.2d 1265, 1280-81 (2d Cir. 1986). It would be an irony if the concept of equality under law, so fundamental to the goal of civil rights,

were underwritten with exceptions for Title VII litigants from the legal rules that apply to all others. The authority which federal courts possess, an authority often summoned to the side of racial justice, is an authority built upon respect for judicial process. That authority cannot, in the long run, be effectively invoked on behalf of civil rights enforcement if civil rights litigants could themselves disregard it with impunity. A careful balance must be struck between chilling Title VII claims, so central to the concept of equal opportunity, and saying that accusations, no matter how unfounded, may be brought immune from the usual rules of law which govern litigants.

From the perspective of this balance, the means by which the district court imposed sanctions upon Ms. Blue, Ms. Harris, and their counsel in this case gives us pause. The sheer breadth and magnitude of its sanctions effort are probably unprecedented. In a lengthy opinion, *see* 679 F. Supp. at 1204-1393, the district court not only invoked every conceivable legal theory on which sanctions could be imposed, but also levied every conceivable sanction, including attorneys' fees, court costs, court salaries (including that of its law clerk), and even a fine and reprimand of counsel for violation of state ethical rules. While the district court's approach undoubtedly was a manifestation of its frustration with the conduct of the parties and of counsel in pressing this protracted litigation as well as an expression of its determination that deleterious claims be forever deterred, an edict of such imposing dimensions may chill meritorious as well as meritless claims and dissuade deserving parties from ever bringing suit for fear of the concomitant burden of sanctions. Congress had a momentous purpose in mind when it enacted Title VII, which was nothing less than the eradication of discrimination in employment throughout society. We are unwilling to witness the evisceration of this purpose through sanctions awarded in a manner that leaves a lasting reluctance on the part of plaintiffs to vindicate the legal rights which Congress gave them.

The government was also the party that sought and was awarded sanctions here. Why it sought sanctions from plaintiffs rather than, for example, moving for summary judgment remains

something of a mystery. The government in this case never moved to dismiss any of Blue's or Harris' claims on the merits, but instead waited until plaintiffs had dropped their claims to move for sanctions on the ground that the dropped claims were frivolous and were brought and abandoned in bad faith. Ordinarily, Title VII claims that are plainly meritless should be disposed of early in the course of litigation through summary judgment or other pretrial motion. The cases in which summary judgment has been granted a Title VII defendant, even after plaintiff was able to establish a prima facie case of discrimination, are numerous. *See, e.g., Mays v. Chicago Sun-Times*, 865 F.2d 134, 137 (7th Cir. 1989); *Klein v. Trustees of Indiana Univ.*, 766 F.2d 275, 280-82 (7th Cir. 1985); *International Woodworkers v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1271 (4th Cir. 1981). As a general matter, dismissal of a frivolous Title VII case on the merits should be a first option, whereas imposition of sanctions should be a matter of last resort.

The law and indeed the equities do not all run in one direction, however. As a matter of law there is no requirement that a party move for summary judgment as a precondition to the recovery of sanctions. Numerous courts have awarded sanctions to prevailing defendants in Title VII cases despite the fact that plaintiffs were allowed to present their cases. *See, e.g., Lewis v. Brown & Root, Inc.*, 711 F.2d 1287 (5th Cir. 1983); *Coleman v. General Motors Corp.*, 667 F.2d 704 (8th Cir. 1981); *Carrion*, 535 F.2d at 723. "Cases that are ultimately viewed as frivolous may well survive. . . motions for summary judgment in which the evidence may be presented in sketchy fashion and credibility may not be taken into account." *Greenberg v. Hilton Int'l Co.*, 870 F.2d 926, 940 (2d Cir.), *vacated on other grounds*, 875 F.2d 39 (2d Cir. 1989). Similarly, there is nothing legally improper about a district court invoking a number of different legal theories to justify its imposition of sanctions. As a matter of fact, it is not particularly unusual for courts to rely on a number of sanctions theories. *See, e.g., Cruz v. Savage*, 896 F.2d 626, 632-35 (1st Cir. 1990) (Rule 11 and § 1927); *Alvarado-Morales v. Digital Equipment Corp.*, 843 F.2d 613, 618 (1st Cir. 1988) (Rule 11 and § 1927); *Shenandoah Women's Center*, 757 F.2d

at 1436 (bad faith exception and Rule 11); *Kendrick v. Zanides*, 609 F. Supp. 1162, 1173 (N.D. Cal. 1985) (bad faith exception, Rule 11, and § 1927); *Day v. Amoco Chemicals Corp.*, 595 F. Supp. 1120, 1122-25 (S.D. Tex. 1984) (bad faith exception, Rule 11, and § 1927). The elaborateness of the district court's sanctions effort is, in part, attributable to the complex and protracted nature of the underlying case and to the effort on the part of a conscientious district court to explain its course of action. An appellate court has a duty not to leave litigants at the mercy of arbitrary district court actions, but it also has a duty not to leave district courts defenseless against those who would abuse the privilege of litigating in them. Once again, appellate review must seek an appropriate balance.

With these principles in mind, we turn to the question whether the district court erred in determining that the conduct of plaintiffs and their counsel was sanctionable.

IV.

Plaintiffs and their counsel forward two arguments that the district court erred as a matter of law in its award of sanctions. First, they argue that their ability to establish a prima facie case for each of their claims of racial discrimination insulates them from the imposition of any sanctions. Second, they contend that § 706(k) of Title VII prevents the government from ever recovering sanctions when it is the prevailing party in a Title VII suit. We will address each of these arguments in turn.

A.

Plaintiffs and their counsel maintain that for each of their claims found frivolous by the district court, they were capable of establishing a prima facie case of racial discrimination under Title VII. They further contend that if the Army had then failed to rebut the prima facie cases, plaintiffs would have prevailed. Thus, they argue, the fact that they were capable of establishing prima facie cases automatically renders erroneous the district court's findings of frivolousness and dictates that their sanctions be reversed.

We cannot agree that the mere establishment of a prima facie case of discrimination will by itself insulate litigants and their counsel from sanctions. The requirements for establishing a prima facie case of racial discrimination under Title VII are, understandably, low: A plaintiff need only demonstrate that she is a member of a protected class, that she applied and was qualified for the position, that she was rejected, and that the employer either continued to seek applicants for the position or filled it with an applicant who was white. *See Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2378 (1989).

A plaintiff's ability to meet this low threshold does not render sanctions inappropriate for the continued litigation of an otherwise patently frivolous case. It will often become plainly apparent in discovery that the employer has produced a legitimate explanation for the employment decision of which plaintiff complains. It is then plaintiff's burden to present evidence that the employer's explanation is a mere pretext for racial discrimination. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). Clearly, if plaintiff has no evidence whatsoever of pretext, the continued litigation of plaintiff's case can be frivolous despite the existence of a prima facie case. *See Introcaso v. Cunningham*, 857 F.2d 965, 967-68 (4th Cir. 1988) ("[I]t is possible for a plaintiff to establish a prima facie case. . .which is nonetheless groundless. . .").

The Supreme Court contemplated as much when, in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), it indicated that sanctions are appropriate for pursuing a case after it becomes clear that the case is without merit. The Court noted that sanctions are appropriate where a "plaintiff is found to have brought *or continued* such a claim in bad faith." *Id.* at 422 (emphasis added). "[D]ogged pursuit of a colorable claim becomes actionable bad faith once the attorney learns (or should have learned) that the claim is bound to fail." *In re TCI, Ltd.*, 769 F.2d 441, 445 (7th Cir. 1985). Of course, we do not insist that plaintiffs have an air-tight case in order to bring suit in federal court. However, litigants and their counsel are not free, simply because they can meet the requirements of a prima facie case,

to disregard evidence that comes to light in discovery and to continue to press their case without any reasonable belief that plaintiffs actually were the victims of racial discrimination.

Plaintiffs and their counsel also complain that the district court applied an incorrect legal standard in arriving at the conclusion that plaintiffs failed to establish a prima facie case under Title VII. They argue that the district court, following this court's precedent in *Holmes v. Bevilacqua*, 794 F.2d 142 (4th Cir. 1986) (en banc), indicated that in order to establish the fourth element of a prima facie case, plaintiff must not merely show that the person ultimately selected for the position was white, but instead had to present "some other evidence that h[er] race was a factor" in the adverse employment decision. *Id.* at 147. They contend that this statement of the law is an incorrect one in light of the Supreme Court's decision in *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2378 (1989), which noted that a plaintiff need only show that the ultimate selectee was white in order to prove the fourth element of a prima facie case. They argue that this error requires that we set aside the district court's findings of frivolousness.

Plaintiffs' statement of the law is certainly a correct one, but it does not permit us to overturn outright the district court's award of sanctions in this case. The district court, recognizing that this area of the law was in a state of flux, expressly sought to "avoid this controversy" by assuming that plaintiffs had established a prima facie case of discrimination and examining the merits of their claims in this light. 679 F. Supp. at 1291. The district court repeatedly emphasized that it found the claims to be meritless and frivolous "even assuming" plaintiffs had established a prima facie case for each of their claims. *Id.* at 1288, 1289, 1290, 1291, 1292, 1293, 1310 n.164, 1322. Plaintiffs proffered no credible evidence that any of the explanations given by the Army for employment decisions adversely affecting plaintiffs were pretexts for racial discrimination. Thus, any application by the district court of an incorrect standard of law with respect to the requirements of a prima facie case did not compromise its ultimate finding that plaintiffs' claims were frivolous.

All of this is not to say that the establishment of a prima facie case is irrelevant to determining whether sanctions are appropriate. To the contrary, this is always an important factor for a district court to consider, and especially so when the issue is whether a plaintiff's suit was frivolous at its inception. Sanctions should normally not be imposed for *filing* a frivolous Title VII claim where "[a]t the start of th[e] action" there was a reasonable belief that a prima facie case existed. *Greenberg*, 870 F.2d at 934-35. However, where, as here, the district court based its award of sanctions not simply on the filing of a frivolous suit but also on the prolonged maintenance of a frivolous suit well after the close of discovery, the establishment of a prima facie case will not invariably immunize plaintiffs and their counsel from sanctions.

B.

Plaintiffs and their counsel next contend that even if their conduct was otherwise sanctionable, the district court was precluded from awarding sanctions to the Army by § 706(k) of Title VII. That provision permits a court to "allow the prevailing party, other than the [EEOC] or the United States, a reasonable attorney's fee." 42 U.S.C. § 2000e-5(k). Plaintiffs and counsel maintain that § 706(k) reflects an affirmative intent on the part of Congress to prevent the government from ever recovering sanctions when it is the prevailing defendant in a Title VII suit.

This argument is overbroad. Appellants' position would allow Title VII plaintiffs litigating against the government to violate their Rule 11 obligations, to act in bad faith, and otherwise to abuse the judicial process, free from the prospect of any kind of control by a court. Congress did not intend, merely by prohibiting the government from recovering attorneys' fees solely because it is the prevailing party, to vitiate the bad faith exception to the American Rule and to negate the explicit language of Rule 11, Rule 16, and § 1927. Appellants' position has been considered and rejected by other courts of appeals. In *Copeland v. Martinez*, 603 F.2d 981 (D.C. Cir. 1979), the District of Columbia Circuit, after carefully reviewing the language, purpose,

and legislative history of § 706(k), held that a district court may impose sanctions against a Title VII plaintiff who brings a bad faith action against the government. The court found no evidence that Congress intended in § 706(k) to preclude an award of sanctions for bad faith litigation, and, in fact, concluded that such a ruling would be contrary to the acknowledged purpose of § 706(k) "to 'deter the bringing of lawsuits without foundation.' " *Id.* at 986 (quoting *Christiansburg Garment*, 434 U.S. at 420). The court went on to state that "[l]itigation brought merely to harass is a wholly unredeemed burden and affront to the judiciary. While its unfairness when the defendant is the United States is somewhat more diffuse than the imposition on a private defendant in the same circumstances, it is not more sufferable." *Id.* at 991. The Fifth Circuit has expressly agreed with the result reached in *Copeland*. *See Butler v. Dep't of Agriculture*, 826 F.2d 409, 414 (5th Cir. 1987). Nothing in appellants' arguments convinces us that we should depart from the holdings of these circuits. We find no intent in § 706(k) to preclude all awards of sanctions to the government no matter how egregious the conduct of the opposing party or counsel.

V.

Plaintiffs and their counsel also contend that the district court abused its discretion in its imposition of sanctions by ruling that their claims were frivolous, vexatious, and brought in bad faith. After a brief discussion of the standard governing our review of a district court's award of sanctions, we will summarize the district court's findings of frivolousness, vexatiousness, and bad faith. We will then address appellants' contention that the district court abused its discretion in making these findings. We will also review the district court's findings that plaintiffs Blue and Harris committed perjury in their testimony before the court.

A.

A district court's decision to impose sanctions is entitled to substantial deference. *See Fahrenz v. Meadow Farm Partnership*, 850 F.2d 207, 210 (4th Cir. 1988). A district court "is in

the best position to review the factual circumstances and render an informed judgment as [it] is intimately involved with the case, the litigants, and the attorneys on a daily basis." *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 873 (5th Cir. 1988) (en banc). Thus, "assessment of frivolousness and attorneys' fees are best left to the sound discretion of the trial court after a thorough evaluation of the record and appropriate factfinding." *Arnold v. Burger King corp.*, 719 F.2d 63, 66 (4th Cir. 1983). The Supreme Court has recently indicated that "an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination." *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2461 (1990). The Court reasoned that

> Rule 11's policy goals . . . support adopting an abuse-of-discretion standard. The district court is best acquainted with the local bar's litigation practices and thus best situated to determine when a sanction is warranted to serve Rule 11's goal of specific and general deterrence. Deference to the determination of courts on the front lines of litigation will enhance these courts' ability to control the litigants before them. Such deference will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court; it will also discourage litigants from pursuing marginal appeals, thus reducing the amount of satellite litigation.

Id. at 2460. We think these considerations apply not only to sanctions imposed under Rule 11, but also to those imposed under the other sanctions theories relied upon by the district court. Thus, in accordance with *Cooter & Gell*, we will reverse the district court's imposition of sanctions here only if we find an abuse of discretion.

B.

Our summary of the district court's factual findings is necessarily an abbreviated one. It is impossible to gain a full

appreciation for the manner in which this litigation was conducted without reading the district court's opinion in its entirety. The district court here found that the claims abandoned by plaintiffs on the eve of trial and the claims of plaintiff Blue which were actually tried were frivolous, vexatious, and completely without merit. The court carefully examined each claim of each plaintiff and concluded that for virtually all the claims there was simply no evidence of racial discrimination. For example, with respect to Blue's tried claims the court noted that "[t]he record in this case is astonishing for its lack of evidence to support plaintiff's claim," 679 F. Supp. at 1297, and again that "[t]he record is literally void of evidence," *id.* at 1307. In all, the court determined that seven of Harris' nine abandoned claims were frivolous, as were nine of Blue's eleven claims, including all of her tried claims. The court found plaintiffs' charges so lacking in credible supporting evidence that it had to conclude that the suits either were initiated in bad faith or were maintained so long after it became apparent that they were baseless that a finding of bad faith was required. In the district court's view, the only "evidence" ever advanced by plaintiffs on their claims were their own "unsubstantiated, self-serving, contradictory, and inconsistent claims of discrimination." *Id.* at 1267.

In addition, the court found that the abandoned claims were dropped at trial without just cause and in bad faith after the filing of the final pretrial orders. The court stated:

> Defendant had a right to rely on the pre-trial orders *sub judice* and to prepare accordingly. Yet, when the time came to try each plaintiff's claims, defendant was legitimately surprised by what claims that plaintiff was not pursuing. Plaintiffs' view appeared to be that since defendant effectively 'won' on any claim not prosecuted, defendant could not be heard to complain — no harm, no foul. This cavalier attitude toward the physical and fiscal resources of the defendant and the court . . . was and remain shocking.

Id. at 1226. Explanations provided by the parties for abandoning their claims were found by the court to be wholly incredible.

The district court laid the blame for the pursuit and abandonment of the frivolous claims at the feet both of the attorneys and of plaintiffs. The court stressed that "[p]re-trial, let alone pre-filing, investigation on nearly every claim alleged by plaintiffs and their counsel was wholly inadequate and, in many cases, seemingly non-existent." *Id.* at 1378-79. It found as a factual matter that "[a]lthough plaintiffs' counsel expended a great deal of effort at securing defendant's documents and files, the litigation established their wholesale failure to read, digest, and analyze the material handed to them." *Id.* at 1379 n.267. The court went on to state that "[i]f this had been done to any professional degree, it is inconceivable that many of plaintiffs' claims would have been filed and clearly none would have been maintained after the close of discovery." *Id.* at 1379. The court observed that

> plaintiffs cried discrimination, and counsel, despite a stunning paucity of evidence, filed suit, hoping defendant would surrender rather than go to trial. When defendant refused to bow down and fought back, plaintiffs went to trial, glaringly unprepared and without a case, apparently hoping to teach defendant a lesson and force a favorable settlement. Neither occurred. A better case for an award of attorneys' fees against counsel could not be made.

Id. at 1380. The court concluded that "[n]o reasonable attorney could possibly have hoped to prevail in this case." *Id.* It also emphasized that "Rule 11 was violated with each and every filing of the plaintiffs relevant to the Blue and Harris claims from (and including) the Pre-Trial Orders forward (if not considerably before that date)." 123 F.R.D. at 229.

As to the plaintiffs themselves, the district court found not only that they had pressed frivolous claims the bases of which they had failed to investigate, but also that their testimony before the court was, at times, "patently perjurious." 679 F. Supp. at 1378. The court stated that "[a]nswers by plaintiffs to examination by defense counsel frequently were deliberately evasive," *id.* at 1379, and that plaintiffs' testimony "was astounding for

its lack of candor and truthfulness," *id.* at 1224. Further, the court stated that

> [t]hese plaintiffs consistently testified either out of shocking ignorance or stunning disregard for the veracity of their allegations. Inconsistencies and evasiveness abound in their testimony and self-serving lapses of memory are fatally pervasive. Some of the factual allegations can most charitably be termed 'fantasies.' . . . Reading the transcript of their testimony . . . leads to one undeniable conclusion — on a number of occasions, [plaintiffs] lied.

Id. The court also found that "[w]hether plaintiffs' respective purposes were entirely vindictive, that is to damage the reputation of [Army personnel] and subject them to personal harassment, is not a question free from doubt. Clearly, however, plaintiffs were motivated by this thought at least in part and on a not infrequent basis in the litigation." *Id.* at 1379.

The court further held that the conduct of plaintiffs and their attorneys, observed by the court over a substantial period of time, mandated a finding of bad faith. After cataloguing the improper conduct it found on the part of plaintiffs and counsel, the court found that "[a]lthough none of these factors alone on any one claim would be sufficient to support a finding of bad faith, the synergistic effect of all the factors in combination with the number of frivolous claims alleged and maintained is devastating. The conclusion to be drawn from this disgraceful scenario is inescapable: the claims listed above either were filed or, shortly thereafter, maintained and prolonged in bad faith." *Id.*

C.

Plaintiffs and their counsel maintain that the above district court findings of frivolousness, vexatiousness, and bad faith are an abuse of discretion because there is evidence of racial discrimination in the record. In addition, they assert that the district court improperly transformed hindsight credibility determinations into factual findings of frivolousness. These questions

are important here because if appellants are correct, the sanctions would be dissovled.

We have closely examined the record for evidence of racial discrimination. Giving plaintiffs' allegations the generous reading we believe they are due, we nonetheless are constrained to uphold the district court's factual determinations. Plaintiff Harris' strongest contention of discrimination was her own testimony at the sanctions hearing that she knew herself to be a victim of discrimination because a note she allegedly saw (but never produced) indicated that another applicant for a job for which she was applying had improperly been preselected for the job. Ignoring for the moment the fact that the district court found Harris' testimony "impossible to believe," 679 F. Supp. at 1548, even if the testimony were accurate it would not without more indicate that she was the victim of racial discriminataion. If one employee was unfairly preselected for the position, the preselection would work to the detriment of all applicants for the job, black and white alike. While if Harris' allegation were true it might demonstrate that she, as well as all the other applicants for the job, may have been unfairly treated, it does not by itself prove racial discrimination. "Title VII does not ensure the best will be selected – only that the selection process will be free from impermissible discrimination." *Casillas v. United States Navy*, 735 F.2d 338, 344 (9th Cir. 1984). "[A]n ill-informed motivation, or even an illegal motivation, is not necessarily a discriminatory one. . . ." *Oates v. District of Columbia*, 824 F.2d 87, 93 (D.C. Cir. 1987).

Similarly plaintiff Blue's strongest evidence of unfair treatment fails to create any inference of racial discrimination. Blue charged that in response to a complaint she made to the union about an annual performance appraisal, one of her supervisors stated that he "would crucify anyone that ever went to the union." While the supervisor's statement was undoubtedly improper, there is no evidence that it was in any way racially motivated. In fact, Blue herself admitted that she did not remember whether the supervisor ever discriminated against her on the basis of race.

While, even if credible, Harris' allegation of preselection and Blue's allegation concerning the warning not to go to the union do not amount to proof of racial discrimination, neither are they much different from many claims which do not prevail but which are brought routinely without the imposition of sanctions. It is not sanctionable for a putative discriminatee to seek to demonstrate that unfairness in some generic sense may prove to be related to the victim's race. In fact, we cannot say that deviations from standard operating procedure and supervisor comments motivated by an unlawful animus of any sort would not prove relevant in an appropriate case to claims of racial discrimination. If the above examples afforded the sole basis for the award of sanctions in this case, it would be a tenuous one.

The above examples were not, however, the sole basis for the award of sanctions. The district court here did not consider plaintiffs' strongest claims alone and isolated from all the other claims and all the other evidence presented in the case. Rather, the district court considered these claims in the context of a host of other claims of racial discrimination which were plainly without basis. For example, the evidence Harris submitted to support two of her claims consisted of a "gut feeling" that she was being discriminated against, based on a perceived lack of interest during her interviews or what she felt to be overly short interviews. As the district court noted, however, Harris came to the conclusion that she had suffered racial discrimination without comparing the length of her interviews or the perceived interest level of the interviewers with those of any other applicant, black or white. *See* 679 F. Supp. at 1350-52. No evidence comparing the treatment Harris received with the treatment of other applicants was ever introduced at the sanctions hearing to show that Harris' claims of discrimination were not frivolous. Contrary to the assertions of Harris and counsel, the district court did not merely assume that her claims were frivolous because they were abandoned, but rather it carefully examined the evidence underlying the claims and determined that the claims most likely were abandoned because they were frivolous. *See id.* at 1347-62. Similarly, the district court time and time again found Blue's claims to be unsupported by any credible evidence. *See, e.g., id.* at 1290-93, 1298-99, 1307.

Thus, the majority of plaintiffs' claims of racial discrimination rested on a "gut feeling" or had no evidence at all to support them. On the other side of the ledger, there was a sizeable quantity of tangible evidence introduced by the government of other explanations for the personnel decisions of which plaintiffs complain, none of which explanations related in any way to plaintiffs' race. To give just one example, a number of Blue's co-workers and superiors, all found credible by the district court, detailed Blue's deficiencies as an employee. As the district court noted, Blue's peers and supervisors described her "as unprofessional, discourteous, confrontative, borderline insubordinate, average in her skills, and as an employee who had the ability to do a much better job if she had ever cared to do so." *Id.* at 1250. These descriptions were not simply impressionistic, but were documented by numerous instances of observed misconduct. Examples of Blue's on-the-job performance ranged from leaving patients unattended in the dental chair in violation of established policy to refusing to follow the instructions of her superiors to disrupting staff meetings. Blue's only response to these repeated descriptions of her conduct was that all of the witnesses were lying. The district court disagreed, however, and we are unable to ignore its factual findings. Nor are we able to ignore that plaintiffs blamed every adverse personnel action on racial discrimination, recklessly charging numerous government officials with racially motivated conduct. In light of the overall paucity of evidence of racial discrimination presented by plaintiffs and the overwhelming evidence of non-racially motivated explanations for the government's personnel decisions, we cannot say that the district court abused its discretion in finding plaintiffs' claims to be frivolous, vexatious, and brought in bad faith.

Counsel protest that they cannot be expected to have foreseen the credibility determinations made by the district court and to have realized that plaintiffs' claims would be found frivolous. However, the district court made plain that the resolution of this case turned upon far more than routine credibility determinations. As the district court explained:

> Defendant had produced an enormous amount of discovery—much of it clearly unrebutted by any

> credible evidence in plaintiffs' possession. . . . . Counsel, certainly by this time (and with respect to Blue, well before) had no reasonable basis upon which to rely on either plaintiff. Significant gaps and inconsistencies existed in plaintiffs' respective versions of events mandating that counsel question their perception of discrimination. When conspiracy theories abound and every negative employment decision, whether effected by black or white, military or civilian personnel, is questioned on a racial basis, counsel have an obligation to inquire behind their client's claims. Here, access to investigate plaintiffs' stories was virtually unchecked. Yet, Harris' claims were filed, and Blue's continued, apparently without any objective thought as to their merit.

679 F. Supp. at 1387. Undoubtedly there are instances in which an attorney acts irresponsibly by failing to investigate the facts behind his client's claim and by instead relying solely on the client's testimony to support his case. "Counsel cannot escape liability, as they attempt to here, by relying solely on their belief that their clients genuinely feel that they were not fairly treated." *Davidson v. Allis-Chalmers Corp.*, 567 F. Supp. 1532, 1542 (W.D. Mo. 1983). "No longer is it enough for an attorney to claim that he acted in good faith, or that he personally was unaware of the groundless nature of an argument or claim." *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 253 (2d Cir. 1985).

Here the district court found that if counsel had made a reasonable investigation of their clients' claims or a reasonable inquiry into the materials handed over to them in discovery, they would have realized that they had no credible evidence of racial discrimination. This counsel did not do. *See Southern Leasing Partners, Ltd. v. McMullan*, 801 F.2d 783, 788 (5th Cir. 1986) ("Blind reliance on the client is seldom a sufficient inquiry. . . ."). While we are mindful that district courts should not impose sanctions based on hindsight logic.

> [w]e do not believe that the district court in this case found the plaintiffs' claims frivolous because of any

> special wisdom received during the course of the litigation that was unknown to the plaintiffs' attorney[s] when the claims were brought. . . . The plaintiffs' attorney[s] w[ere] in a position to know the claims were unsupported by fact or law prior to bringing the claims and throughout the litigation.

Cruz, 896 F.2d at 633. Thus, counsel cannot simply rely on a client's patently incredible testimony when any reasonable investigation of the factual bases for the client's claims or examination of materials obtained in discovery would reveal the paucity and implausibility of the evidence. Again, there is nothing to lead us to conclude that the district court abused its discretion in making its findings of frivolousness, vexatiousness, and bad faith, or in blaming both the parties and counsel for pursuit of these frivolous claims.[1]

D.

Plaintiffs' challenges to the district court's findings of perjury on the part of Ms. Harris and Ms. Blue are equally unavailing.

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[1] Nor does any statistical evidence demonstrate that the district court abused its discretion. Plaintiffs' lack of statistical evidence of discrimination was found by the district court to be "shocking." 679 F. Supp. at 1225. The court stated that with respect to Blue's claims "there simply was no statistical presentation made . . . even in support of her disparate *impact* allegations." *Id.* (emphasis in original). As for the statistical evidence presented in the claim of another plaintiff which Blue sought to have applied retrospectively to her claim, the court found that evidence so flawed as to be no evidence at all. For example, plaintiffs' expert witness failed to distinguish employees not referred for promotion under one challenged promotion criteria from those not referred under another, employed a sparse database for his projections, never attempted to control for the disproportionate effect some plaintiffs had on the statistics because of their multiple applications and non-referrals, and drew comparisons of the race of those promoted with the racial composition of the labor pool using a labor pool of little, if any, legal relevance. Ignoring all the multiple flaws in the statistical analysis, however, the district court still found that application of a standard deviation analysis to plaintiffs' data "reveal[ed] no legally significant difference between the referral rates of white and black applicants." *Id.* at 1298 n.150. As the district court pointed out, plaintiffs' expert himself "essentially admitted on cross-examination that his analysis failed to show any statistically relevant fact about whether blacks at Fort Bragg had been discriminated against in the promotion process." *Id.* at 1225 n.8.

While an appellate court is unable to observe testimony first-hand and "taste[] the flavor of the litigation" in the same manner as a district court, *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1174 (D.C. Cir. 1985), our review of the record does not persuade us that the district court's findings of perjury were ill founded. The testimony of both Harris and Blue reveals contradictions and evasions on the most central of issues.

For example, when Harris first moved to withdraw her claims, she sought to do so without prejudice, arguing that it would be more convenient for the court to hear her claims together with other claims she was pursuing in an administrative forum but which she might bring before the court at a future date. After the court rejected Harris' motion, she agreed to withdraw her claims with prejudice. When questioned at the sanctions hearing as to why she had abandoned her claims, Harris forsook the convenience rationale, and asserted that she was financially unable to pursue her administrative claims and her court claims at the same time because it would require that she retain separate counsel. She was later forced to admit, however, that she was never required to make any financial contribution to litigation of the court case, but instead that any contributions she made were voluntary. The court found that she only contributed some $70 to the fund established to defray costs of litigation. In addition, Harris' administrative claims were handled at no cost to her by a union attorney. Moreover, Harris and her husband shared a combined annual income of over $30,000, as well as other substantial assets including, *inter alia*, a money market account, lakefront property, a boat, and a truck. Harris failed to mention any of these assets when originally questioned about her finances, only recalling these resources when directly confronted with their existence. Finally, Harris alleged at the sanctions hearing that she was forced to withdraw from the lawsuit because of the stress it had caused her. This belated explanation was never raised until her testimony at the hearing, and no documentary or anecdotal evidence was submitted to support it. Moreover, this explanation appears somewhat suspect in light of Harris' statement that she travelled approximately 90 miles to attend Blue's trial as a spectator in order to relax. In light of such testimony, it is not surprising that the

district court would describe Harris' story as "a tortured path of inconsistent, evasive and wholly incredible explanations for an untimely decision made to abandon and dismiss a host of patently frivolous claims." 679 F. Supp. at 1340.

Blue's testimony as well was marked by "insidious and less than subtle shift[s]." *Id.* at 1317. For example, more than once Blue testified on direct examination that she had concluded that she was better qualified than other candidates for a job position after reviewing the other candidates' qualifications, only to admit on cross-examination that she had no knowledge of the other candidates' qualifications. *See id.* at 1277. On as basic an issue as whether a particular Army official had discriminated against her, Blue was unable to tell a consistent story. First, she testified that she could not remember whether he had discriminated against her, then she said he may have discriminated against her, and finally, after being shown her pre-trial deposition, she concluded that he did indeed discriminate against her. *See id.* at 1251. These are but a few examples of an oft-repeated scenario. Our review of the testimony in this case reveals that the district court did not err in finding that plaintiffs committed perjury.

E.

In reviewing the district court's findings of frivolousness and perjury, we are cognizant of the fact that adverse credibility determinations are made in virtually every Title VII case, but are only infrequently the basis for an award of sanctions. Needless to say, every instance in which a district court credits one side's witnesses over another's is not an occasion for sanctions. We also recognize that the presence of discrimination can be pervasive but that the proof of discrimination can be elusive. A "smoking gun" is often not to be found in a discrimination suit. Instead, Title VII plaintiffs must often prove their cases by circumstantial evidence, or "indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. Sanctions plainly are not appropriate simply because a party is attacking discrimination in its subtle guises.

Nonetheless, a line undoubtedly exists which separates efforts to attack discrimination in its subtler forms from baseless accusations of discrimination. Our thorough review of the record demonstrates that the district court did not abuse its discretion in finding that appellants crossed that line in this case. The picture the district court paints is a vivid one. The court makes clear that this is a case in which plaintiffs Blue and Harris leveled widespread charges of racial discrimination without any regard for the truth of their allegations, abandoned frivolous claims without notice after the Army had spent significant amounts of time and money preparing to rebut them, and perjured themselves, all in order to harass and embarrass the personnel at Fort Bragg; and, further, that this is a case in which counsel failed to perform their responsibilities of investigating the foundation for their clients' claims, failed to examine much of the material turned over to them in discovery, and simply pressed forward with their case heedless of whether the claims they were pursuing were legitimate ones.

Such conduct is undoubtedly sanctionable under the theories employed by the district court. *See, e.g., Pantry Queen Foods, Inc. v. Lifschultz Fast Freight, Inc.*, 809 F.2d 451, 453 (7th Cir. 1987) (sanctions appropriate under Rule 11 where counsel has not made a reasonable inquiry into facts before filing papers with the court); *Nepera Chemical, Inc. v. Sea-Land Serv., Inc.*, 794 F.2d 688, 702 & n.105 (D.C. Cir. 1986) (sanctions appropriate under bad faith exception " 'where a party brings or maintains an unfounded suit' "); *Jones v. Continental Corp.*, 789 F.2d 1225, 1230 (6th Cir. 1986) (sanctions appropriate when "an attorney knows or reasonably should know that a claim pursued is frivolous"); *Dow Chemical Pacific Ltd. v. Rascator Maritime, S.A.*, 782 F.2d 329, 345 (2d Cir. 1986) (sanctions appropriate for bad faith "in instigating or maintaining the litigation . . . as exhibited by, for example, . . . pursuit of frivolous contentions"); *In re TCI, Ltd.*, 769 F.2d at 445 ("If a lawyer pursues a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound, the conduct is objectively unreasonable and vexatious."); *Dreiling v. Peugeot Motors of America, Inc.*, 768 F.2d 1159, 1165 (10th Cir. 1985) (sanctions awarded under § 1927 where the parties and their

attorney "continued to assert claims for liability against [defendant] with knowledge that they had no factual or legal basis or claim of liability against him, and did so long after it would have been reasonable and responsible to have dismissed the claims"); *Eastway Constr. Corp.*, 762 F.2d at 254 ("[S]anctions shall be imposed against an attorney and/or his client when it appears that . . . after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact. . . ."); *Perichak v. International Union of Electrical Radio & Machine Workers, Local 601, AFL-CIO*, 715 F.2d 78, 83 (3d Cir. 1983) (sanctions imposed where plaintiff's claims were unsupported by evidence and plaintiff made a "material false statement under oath"); *Brown & Root*, 711 F.2d at 1291 (sanctions awarded where "the evidence offered by [plaintiff] did not demonstrate, even by inference, any unlawful discrimination"); *Nemeroff v. Abelson*, 704 F.2d 652, 659 (2d Cir. 1983) (sanctions awarded against plaintiffs and attorneys when they maintained suit "when they should have realized that they had no support for their charges").[2]

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[2] Appellants attack the district court's award of sanctions on two additional grounds. First, they suggest that the court's method for organizing the presentation of evidence caused confusion and led the court incorrectly to conclude that they had abandoned claims when they had not. They assert that certain of their claims were never meant to be claims for relief to be presented in the first phase of the trial, but instead were only meant to be introduced as background evidence of discrimination in a later phase of the trial. They argue that they did not abandon these claims, but reserved them to be introduced in the later phase.

This argument is without merit. While appellants may never have intended these claims to be claims for relief, there is nothing in the pretrial order or elsewhere to alert the defendant in this regard. Defendant was forced to prepare for these claims as if they were claims for relief because appellants never designated in the pretrial order that the claims were only being introduced as background evidence. As the district court noted:

> [B]ackground claims (some never denominated as such) and claims for relief were abandoned and merged with lightning speed . . . at the whim of the plaintiffs and without any advance notice to

(Footnote continued)

VI.

To conclude that the conduct of this litigation was sanctionable does not, however, end our inquiry into the propriety of the sanctions. We must also examine whether the district court erred in imposing sanctions on both the senior partner originally in charge of the litigation, Julius Chambers, and on the associate who was left to bring the lawsuit to its conclusion, Geraldine Sumter.

A.

The district court imposed sanctions upon Sumter as "primary trial counsel" at the time much of the misconduct occurred. It concluded that because she was lead counsel during this period, "a significant amount of the reckless, vexatious and frivolous conduct of plaintiffs is fairly laid to rest at Sumter's doorstep." 123 F.R.D. at 223. The court also apparently felt that since Sumter's conduct was sanctionable when viewed objectively, it was not free to take into account such considerations as her relative inexperience and the difficult position in which she was placed.

We think the district court took too narrow a view of its authority here. In awarding sanctions, a district court has the discretion to consider a broad range of factors. Even though an

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> defendant or the court. One was never certain, even on the eve of trial, of exactly what claims plaintiffs were pursuing, whether designated claims would be expressly waived, or whether claims, clearly designated for trial in the pre-trial order, would simply creep slowly and silently away into the night never to be heard from again.

679 F. Supp. at 1226.

Second, appellants suggest that their claims could not have been frivolous because the Army changed its promotion policies after the complaint was filed, abandoning some of the criteria for promotion challenged by plaintiffs. The Army altered its promotion policies in 1982 because of renegotiation of its collective bargaining agreement with the employees' union. There is nothing to suggest that the Army altered its policies because they had previously been discriminatory or that the changes were in fact a response to this lawsuit.

attorney has engaged in conduct which is otherwise sanctionable, "a district court should reflect upon equitable considerations in determining the amount of the sanction." *Brown v. Federation of State Medical Bds.*, 830 F.2d 1429, 1439 (7th Cir. 1987). "[A] district court may, in its discretion, refuse to award attorney's fees even where it finds the existence of bad faith, if, in balancing the equities, it nevertheless determines that an award in a particular case would not serve the interests of justice." *Perichak*, 715 F.2d at 80. In exercising this discretion, a district court may consider such factors as an attorney's experience and whether the attorney entered the case at an advanced stage. *See Brown*, 830 F.2d at 1439.

Here, Sumter was placed on this massive case immediately after joining Chambers' firm, then known as Chambers, Ferguson, Watt, Wallas, Adkins & Fuller. She was only eighteen months out of law school, and only six months out of a judicial clerkship. Only one month remained in discovery when she entered the case. A year and one-half later, when Chambers became Director-Counsel of the NAACP Legal Defense Fund, Sumter was left as the attorney with primary responsibility for litigating the case. At times, she found herself litigating virtually alone against a defense team of eleven persons.

The sanctionable conduct on the part of the attorneys in this case was their widespread failure to perform their responsibilities as attorneys—to investigate the facts underlying their clients' charges of discrimination and to examine the materials handed over to them in discovery before proceeding with their case. Whatever its reason, this is a failure which cannot be ignored and which is deserving of sanctions. However, to place blame for the attorneys' failure on a very junior associate working on her first case for her firm, who entered the case near the end of discovery, who was merely following the directions of a senior partner in charge of the case, and who was left in the untenable position of lead counsel on a massive discrimination case for which the background factual investigation and corroboration had never been done is an unrealistic and unjust result. We do not think the district court gave adequate consideration to all these factors, and we are unwilling to see the career of a young

attorney compromised at its inception because she found herself cast virtually alone into a case which a team of experienced lawyers would have deemed a daunting one. We therefore direct that the award of sanctions against Ms. Sumter be set aside.

B.

We next proceed to address the award of sanctions against Mr. Chambers. Chambers was the experienced senior partner in charge of the case from its outset. He is fairly charged with responsibility for permitting a case of this dimension to go forward in the absence of evidence. He should have assured that the case was adequately staffed so that the factual bases of his clients' claims were investigated and the materials obtained in discovery were read and digested, and he should not have left an inexperienced junior associate in charge of such a massive litigation effort.[3]

Mr. Chambers' past professional conduct, however, has been that of a litigant who takes seriously an advocate's responsibility as an officer of the court. It is not beyond the ken of judicial notice to observe that Julius Chambers is a respected civil rights

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[3] While the parties quibble over various individual sanctions theories relied upon by the district court, we think it beyond cavil that the district court possessed the authority to impose sanctions. While we do not suggest that federal courts are in accord over the various particulars of every sanctions theory, it is clear that a core of sanctionable conduct exists and that all of the sanctioning authorities invoked by the court were intended to deter vexatious conduct, unnecessary delay, and the prolongation of litigation with insubstantial claims. *See Alyeska Pipeline*, 421 U.S. at 258-59 (authorizing sanctions against attorneys who have acted " 'vexatiously, wantonly, or for oppressive reasons' "); 28 U.S.C. § 1927 (authorizing sanctions against attorneys who "multipl[y] the proceedings in any case unreasonably and vexatiously"); Fed. R. Civ. P. 11 (authorizing sanctions if attorneys file papers with the court which are not the product of a "reasonable inquiry" or which are interposed "to cause unnecessary delay or needless increase in the cost of litigation"); Fed. R. Civ. P. 16 (authorizing sanctions if attorneys fail to "participate in good faith" in pretrial conferences). Indeed, in the cases mentioned in the sections above, particularly section V-E, courts have made plain that a variety of theories may be employed to sanction conduct such as that found by the district court in this case.

advocate who has contributed his considerable professional abilities to changing the life of a region for the better. He has played a valuable role in the efforts to realize equal opportunity under law, and he has been involved in the litigation of some of the Supreme Court's most significant civil rights cases. *See, e.g., Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). His record of responsible advocacy before this court has been equally impressive. *See, e.g., Martin v. Charlotte-Mecklenburg Bd. of Ed.*, 626 F.2d 1165 (4th Cir. 1980); *Johnson v. Ryder Truck Lines*, 555 F.2d 1181 (4th Cir. 1977); *Russell v. American Tobacco Co.*, 528 F.2d 357 (4th Cir. 1975); *Johnson v. Seaboard Air Line R.R.*, 405 F.2d 645 (4th Cir. 1968).

The question that confronts this court is whether this past record of professional responsibility and accomplishment should lead us to vacate the award of sanctions in the instant case. We cannot conclude, however, that the district court abused its discretion in awarding sanctions against him. *See Fahrenz*, 850 F.2d at 210. To find that the district court abused its discretion and to relieve Chambers of all sanctions here would be to issue an open invitation to distinguished attorneys across this country to challenge sanctions awarded against them on grounds that were ungermane to their performance in the particular case. It would involve courts in an impossible task of reputational measurement. It would run counter to the notion that a court should look to a lawyer's conduct in the instant litigation in assessing his or her behavior, and that a lawyer's obligation to the court is renewed with each appearance. *See Rascator Maritime*, 782 F.2d at 345. It would also be unfair to opposing parties whose rights the sanctions were in part imposed to vindicate. Ultimately, it would be to hold the most prominent members of the legal profession above the law. Applying this standard, we hold that an award of sanctions against Mr. Chambers shall stand.

We see no reason, however, why Mr. Chambers should shoulder those sanctions erroneously imposed upon Ms. Sumter. In order to fulfill the purposes of Rule 11 and the other

sanctions theories invoked by the district court, it is important that we require the attorneys to pay a reasonable sanction; however, "[i]n this respect, 'reasonable' does not necessarily mean actual expenses and attorney's fees." *Fahrenz*, 850 F.2d at 211. The government may protest that if Chambers does not bear the full brunt of those sanctions originally imposed upon Sumter, then it will not be fully reimbursed for its fees. While this is true, the purposes of sanctions are several, and encompass deterrence as well as recompense. *Jackson v. Law Firm*, 875 F.2d 1224, 1229 (6th Cir. 1989). The former rationale may, in a particular case, mandate an award of sanctions that is either more or less than the actual costs and fees. Here, we believe that an appropriate note of caution can be sounded without requiring Mr. Chambers to assume the sanctions erroneously awarded against Ms. Sumter.

Thus, the award of sanctions against Ms. Sumter is set aside. The award of sanctions against Mr. Chambers, as well as the awards against plaintiffs Harris and Blue, are upheld, subject to the modifications discussed hereinafter.

VII.

Plaintiffs and counsel maintain that the district court erred in imposing sanctions of the magnitude it did. In particular, they argue that the district court acted beyond its authority in including judicial salaries as a component of the sanctions and in sanctioning them for expenses incurred in the litigation of the sanctions hearing. We will address each of these arguments in turn.

A.

Plaintiffs and counsel charge that the district court erred in imposing upon them a penalty of nearly $38,000 for the expenses, including salaries, of the court and its staff. They maintain that such a severe sanction threatens the court's appearance of impartiality and creates an unnecessary deterrent to use of the court system.

We find merit in this vew. While the Judicial Code provides that a court may tax as court costs such expenses as the fees of the court clerk, marshall, and court reporter, it nowhere permits a district court to tax as expenses judicial salaries or the salaries of its law clerk and other staff members. 28 U.S.C. § 1920; *see also Ray A. Scharer & Co. v. Plabell Rubber Prods.*, 858 F.2d 317, 321 (6th Cir. 1988) (expressing "doubt . . . that the court may or should assess its 'costs of operation' as sanctions"). As bodies which are not subject to direct democratic control, courts should be hesitant to create their own free-shifting provisions, for to do so runs the risk of "mak[ing] major inroads on a policy matter that Congress has reserved for itself." *Alyeska Pipeline*, 421 U.S. at 269. Imposing the costs of judicial salaries, including those of law clerks, upon litigants as a sort of "user fee" sanction may operate as an impediment to judicial access for those with legitimate claims.

We do not hold that it is never appropriate for a district court to assess against a party nominal court expenses not provided for in 28 U.S.C. § 1920. We have previously approved a sanction of $2,000 for juror costs imposed pursuant to local rule. *See White v. Raymark Indus.*, 783 F.2d 1175 (4th Cir. 1986). Similarly, at least one other court has upheld a $390 sanction representing the district court's cost of impanelling jurors incurred because of a delay in settlement. *See Eash v. Riggins Trucking*, 757 F.2d 557 (3d Cir. 1985) (en banc). However, we cannot casually endorse a sanction of the magnitude of the one here which seeks to tax litigants with the cost of judicial salaries. We therefore set aside the sanctions for court salaries, leaving intact the imposition of court costs for the expenses of the clerk of the court and the court reporter which are authorized under 28 U.S.C. § 1920.

B.

Plaintiffs and counsel also challenge the propriety of the district court's award of sanctions for the prosecution and trial of the sanctions motions. They point to langauge in this circuit's opinion in *Introcaso v. Cunningham Corp.*, 857 F.2d 965 (4th Cir. 1988), disallowing sanctions based on "litigation activity

and associated expenses for defendant's motion for attorney's fees under § 1988 and Rule 11." *Id.* at 970. They also contend that there were no findings by the district court that their conduct in opposing the sanctions motions was frivolous or improper.

We agree that the district court erred in imposing sanctions on counsel for opposing the sanctions motions. Litigants should be able to defend themselves from the imposition of sanctions without incurring additional sanctions. The district court's findings of misconduct with respect to the attorneys was centered upon their widespread failure to investigate the factual bases for their clients' claims and to review the materials obtained in discovery, not upon their conduct during the sanctions hearings. We thus find no sanctionable conduct in the attorneys' opposition to the sanctions motions.

Plaintiffs, on the other hand, were found by the district court to have engaged in numerous instances of untruthfulness during the course of their testimony at the sanctions hearing. To rule that sanctions can never be imposed on a party for misconduct during a sanctions hearing, no matter how egregious, would be to license the wholesale abuse of these hearings. Because plaintiffs were found to have perjured themselves during the sanctions hearing, the sanctions imposed upon them for the conduct of the hearing must stand. Thus, we set aside the sanctions arising out of the prosecution of the sanctions hearing with respect to counsel, but sustain the sanctions with respect to plaintiffs.

VIII.

Counsel's law firm, Ferguson, Stein, Watt, Wallas & Adkins, challenges the district court's imposition of sanctions against it in the amount of $1,413. The district court based its award of sanctions on the fact that "a number of other lawyers with the firm participated in this case in varying minor ways." 679 F. Supp. at 1392. The firm argues that this vague finding is insufficient to support an award of sanctions. It also questions whether any of the sanctions theories authorize the imposition of sanctions upon a law firm.

We agree that the award of sanctions against the law firm was improper. The district court's statement about the involvement of firm lawyers in the case does not specify any sanctionable conduct on the part of the attorneys, nor are we able to locate any sanctionable conduct in the record. *See F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1268 (2d Cir. 1987) (reversing sanctions because of inadequate findings by district court); *Rascator Maritime*, 782 F.2d at 345 (same). Because there is no basis in this record upon which to sanction the law firm, we need not address the question whether a law firm can ever be sanctioned under the theories invoked by the district court. We note, however, that the Supreme Court has ruled that Rule 11 does not authorize sanctions against a law firm, *see Pavelic & Leflore v. Marvel Entertainment Group*, 110 S. Ct. 456 (1989), and that we are doubtful that the other sanctions theories will support sanctions against an entire firm rather than against the individual lawyers who acted improperly. Thus, the sanctions against Ferguson, Stein, Watt, Wallas & Adkins are hereby set aside.

IX.

The NAACP Legal Defense Fund complains that the district court was without the authority to order it not to pay the sanctions on behalf of counsel. The Legal Defense Fund argues that it was not before the district court, that the court had no basis upon which to order it not to pay the sanctions, and that by interfering with its decisions regarding allocation of its resources the order interfered with its First Amendment rights of free speech and association.

The Supreme Court has made it clear that a district court may impose its sanctions solely upon the responsible attorneys and has approved the "greater economic deterrence" achieved thereby. *Pavelic v. LeFlore*, 110 S. Ct. at 460. In this case, however, the district court did not order the Legal Defense Fund not to pay the sanctions because of a concern that plaintiffs and counsel would not be sufficiently deterred, but instead because of a concern that the Legal Defense Fund's resources be spent on worthy causes. The court stated that "[t]he NAACP is an historic institution that has contributed substantially to the racial

progress of this country. It continues to serve this vital purpose and the court does not propose to see any money diverted from its crucial mission." 679 F. Supp. at 1392 n.280. However well-intentioned the district court may have been, a concern for how the Legal Defense Fund allocates its monies is not a legitimate basis on which to order it not to pay sanctions. Thus, we need not address the other issues raised by the Legal Defense Fund. The order that it pay no monies toward the sanctions is vacated.

X.

Finally, Chambers and Sumter argue that the district court acted improperly in adjudging them to have violated the North Carolina Rules of Professional Conduct. They contend that the district court failed to follow its own local rules in disciplining the attorneys, and that this requires that the disciplinary finding be vacated.

We agree. Rule 105.01 of the Rules of Disciplinary Procedure adopted by the United States District Court for Eastern District of North Carolina requires that when any "misconduct on the part of an attorney admitted to practice before this court which, if substantiated, would warrant discipline" comes to the attention of a judge of the court "by complaint or otherwise," that judge must "refer the matter to counsel for investigation and if warranted the prosecution of a formal disciplinary proceeding." The Rules further provide that "if the disciplinary proceeding is predicated upon the complaint of a judge of this court the hearing shall be conducted before another judge of this court." E.D.N.C. Disc. R. 105.04. The district court plainly did not follow these procedures in this case, instead imposing the disciplinary penalty sua sponte based on its own observations of counsel's behavior.

The district court maintained, however, that it was authorized to discpline the attorneys as it did under Rule of Disciplinary Procedure 112.00. That Rule establishes that "[n]othing contained in these Rules shall be construed to deny to this court such powers as are necessary for the court to maintain control over proceedings conducted before it, such as proceedings for contempt." E.D.N.C. Disc. R. 112.00. We think this provision

was not intended, as the district court believed, to allow a district court to impose disciplinary penalties at its own behest for any unethical conduct which occurs before it, but rather to allow a court the ability to deal summarily with disruptive conduct in the courtroom. Where, as here, an attorney's conduct does not threaten the orderly administration of justice in the courtroom, a district court should follow the procedures set forth in Rules 105.01-04 providing, *inter alia*, for notice, an opportunity to be heard, and an independent arbiter. *Cf. In re Chaplain*, 621 F.2d 1272, 1275 (4th Cir. 1980) (exercise of summary contempt powers may only be appropriate "when immediate action is required to preserve order in the proceedings and appropriate respect for the tribunal"). Because the district court failed to follow these procedures in this case, we vacate the district court's reprimand of counsel for a breach of professional ethics and the accompanying fine. *See In re Thalheim*, 853 F.2d 383, 386-88 (5th Cir. 1988); *In re Abrams*, 521 F.2d 1094, 1104-05 (3d Cir. 1975).

XI.

This case is not one of a district court sanctioning attorneys and their clients for forwarding novel legal claims. Rather, it is a case in which a district court imposed sanctions because the parties and counsel pressed on a massive scale insubstantial claims unsupported by any credible evidence. The parties were found not to have abandoned their frivolous claims until the very eve of trial, to have maintained plainly baseless suits, and to have perjured themselves on the witness stand, all in an effort to harass the defendant. Counsel was found to have shirked its responsibility to explore the factual bases for the clients' suits and to examine the materials obtained in discovery, instead charging forward with the litigation in disregard of its manifest lack of merit. Such conduct cannot be condoned.

The district court therefore did not abuse its discretion in determining that the conduct warranted appropriate sanctions. But, for reasons earlier given, we are satisfied that the court then failed to exercise sufficient selectivity in imposing the wide-ranging sanctions that it chose and sufficient sensitivity to the

deterrent effect its decision might create upon future Title VII litigants with meritorious claims. In our view, this did constitute an abuse of the court's discretion which we are obliged to correct in the exercise of our reviewing function.

We have not happily assumed the task of upholding an award of sanctions against a distinguished attorney or of overturning the exercise of discretion on the part of a conscientious district judge, but our review of the record has left us no choice. To recapitulate our holding: the sanction against Ms. Sumter is set aside in its entirety; the sanction against Mr. Chambers is upheld, but is reduced by the amounts awarded for judicial salaries and for defense of the sanctions hearing; the sanctions against Ms. Harris and Ms. Blue are upheld, but are reduced by the amounts awarded for judicial salaries; the sanction against the law firm Ferguson, Stein, Watt, Wallas & Adkins is set aside; the order directing the NAACP Legal Defense Fund to pay no monies toward counsel's sanctions is vacated; and the reprimand of counsel for a breach of professional ethics and its accompanying fine are also vacated.

* * *

The judgment of the district court is affirmed in part and reversed in part, and this case is remanded to the district court for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-1364

SANDRA L. BLUE,

Plaintiff-Appellant,

and

MATTIEBELLE C. HARRIS; SAMUEL P. SHEPPARD; EDWARD R. HUMPHREY; ROBERT L. EVANS; BEULAH MAE HARRIS; LEONETTA BIBBY; ANNETTE TODD; WILLIAM KINCY; JAMES T. LOVE; MANUEL EARLY; BERNARD FIELDS; BETTY REID; LYNN SILER; LELIA WALKER; THELMA CURRY; JOHN SMITH; JAMES N. FLEMING; GERALDINE BALLEW; ROBERT BRONSON; OMIE WHITE; CARLTON GILES; EDITH B. McMILLAN; MITCHELL McKELLER: CAROL J. ANDERSON; VEOLA McLEAN; ALICIA CHISHOLM; KING S. CAMERON; JEANE HENDON; JOYCE MALONE; DEBORAH McMILLAN; DORIS TURNER; VIOLET HENDERSON; NANCY ALEXANDER; CATHERINE GUTIERREZ; NANCY McGLONE; JESSIE WILLIAMS; DIANNE SHEPPARD; LEONZA LOFTIN,

Plaintiffs,

versus

UNITED STATES DEPARTMENT OF THE ARMY; JOHN O. MARSH, JR., Secretary, U. S. Department of the Army,

Defendants-Appellees.

No. 88-1376

BEULAH MAE HARRIS,

Plaintiff-Appellant,

and

MATTIEBELLE C. HARRIS; SAMUEL P. SHEPPARD; EDWARD R. HUMPHREY; ROBERT L. EVANS; LEONETTA BIBBY; ANNETTE TODD; WILLIAM KINCY; JAMES T. LOVE; MANUEL EARLY; BERNARD FIELDS; BETTY REID; LYNN SILER; LELIA WALKER; THELMA CURRY; JOHN SMITH; JAMES N. FLEMING; GERALDINE BALLEW; ROBERT BRONSON; OMIE WHITE; CARLTON GILES; EDITH B. McMILLAN; MITCHELL McKELLER; CAROL J. ANDERSON; VEOLA McLEAN; ALICIA CHISHOLM; KING S. CAMERON; JEANE HENDON; JOYCE MALONE; DEBORAH McMILLAN; DORIS TURNER; VIOLET HENDERSON; NANCY ALEXANDER; CATHERINE GUTIERREZ; NANCY McGLONE; JESSIE WILLIAMS; DIANNE SHEPPARD; LEONZA LOFTIN; SANDRA L. BLUE,

Plaintiffs,

versus

UNITED STATES DEPARTMENT OF THE ARMY; JOHN O. MARSH, JR., Secretary, U. S. Department of the Army,

Defendants-Appellees.

No. 88-1377

In Re: FERGUSON, STEIN, WATT, WALLAS & ADKINS, P.A.,

Appellant,

MATTIEBELLE C. HARRIS; SAMUEL P. SHEPPARD; EDWARD R. HUMPHREY; ROBERT L. EVANS; BEULAH MAE HARRIS; LEONETTA BIBBY; ANNETTE TODD; WILLIAM KINCY; JAMES T. LOVE; MANUEL EARLY; BERNARD FIELDS; BETTY REID; LYNN SILER; LELIA WALKER; THELMA CURRY; JOHN SMITH; JAMES N. FLEMING; GERALDINE BALLEW; ROBERT BRONSON; OMIE WHITE; CARLTON GILES; EDITH B. McMILLAN; MITCHELL McKELLER: CAROL J. ANDERSON; VEOLA McLEAN; ALICIA CHISHOLM; KING S. CAMERON; JEANE HENDON; JOYCE MALONE; DEBORAH McMILLAN; DORIS TURNER; VIOLET HENDERSON; NANCY ALEXANDER; CATHERINE GUTIERREZ; NANCY McGLONE; JESSIE WILLIAMS; DIANNE SHEPPARD; LEONZA LOFTIN; SANDRA L. BLUE,

Plaintiffs,

versus

UNITED STATES DEPARTMENT OF THE ARMY; JOHN O. MARSH, JR., Secretary, U. S. Department of the Army,

Defendants.

No. 88-1378

In Re: GERALDINE SUMTER,

Appellant,

MATTIEBELLE C. HARRIS; SAMUEL P. SHEPPARD; EDWARD R. HUMPHREY; ROBERT L. EVANS; BEULAH MAE HARRIS; LEONETTA BIBBY; ANNETTE TODD; WILLIAM KINCY; JAMES T. LOVE; MANUEL EARLY; BERNARD FIELDS; BETTY REID; LYNN SILER; LELIA WALKER; THELMA CURRY; JOHN SMITH; JAMES N. FLEMING; GERALDINE BALLEW; ROBERT BRONSON; OMIE WHITE; CARLTON GILES; EDITH B. McMILLAN; MITCHELL McKELLER; CAROL J. ANDERSON; VEOLA McLEAN; ALICIA CHISHOLM; KING S. CAMERON; JEANE HENDON; JOYCE MALONE; DEBORAH McMILLAN; DORIS TURNER; VIOLET HENDERSON; NANCY ALEXANDER; CATHERINE GUTIERREZ; NANCY McGLONE; JESSIE WILLIAMS; DIANNE SHEPPARD; LEONZA LOFTIN; SANDRA L. BLUE,

Plaintiffs,

versus

UNITED STATES DEPARTMENT OF THE ARMY; JOHN O. MARSH, JR., Secretary, U. S. Department of the Army,

Defendants.

No. 88-1379

In Re: JULIUS L. CHAMBERS,

Appellant,

MATTIEBELLE C. HARRIS; SAMUEL P. SHEPPARD; SANDRA L. BLUE; EDWARD R. HUMPHREY; ROBERT L. EVANS; BEULAH MAE HARRIS; LEONETTA BIBBY; ANNETTE TODD; WILLIAM KINCY; JAMES T. LOVE; MANUEL EARLY; BERNARD FIELDS; BETTY REID; LYNN SILER; LELIA WALKER; THELMA CURRY; JOHN SMITH; JAMES N. FLEMING; GERALDINE BALLEW; ROBERT BRONSON; OMIE WHITE; CARLTON GILES; EDITH B. McMILLAN; MITCHELL McKELLER: CAROL J. ANDERSON; VEOLA McLEAN; ALICIA CHISHOLM; KING S. CAMERON; JEANE HENDON; JOYCE MALONE; DEBORAH McMILLAN; DORIS TURNER; VIOLET HENDERSON; NANCY ALEXANDER; CATHERINE GUTIERREZ; NANCY McGLONE; JESSIE WILLIAMS; DIANNE SHEPPARD; LEONZA LOFTIN,

Plaintiffs,

versus

UNITED STATES DEPARTMENT OF THE ARMY; JOHN O. MARSH, Jr., Secretary, U. S. Department of the Army,

Defendants-Appellees.

No. 88-1380

NAACP LEGAL DEFENSE AND EDUCATION FUND, INC.,

Appellant,

and

MATTIEBELLE C. HARRIS; SAMUEL P. SHEPPARD; EDWARD R. HUMPHREY; ROBERT L. EVANS; BEULAH MAE HARRIS; LEONETTA BIBBY; ANNETTE TODD; WILLIAM KINCY; JAMES T. LOVE; MANUEL EARLY; BERNARD FIELDS; BETTY REID; LYNN SILER; LELIA WALKER; THELMA CURRY; JOHN SMITH; JAMES N. FLEMING; GERALDINE BALLEW; ROBERT BRONSON; OMIE WHITE; CARLTON GILES; EDITH B. McMILLAN; MITCHELL McKELLER: CAROL J. ANDERSON; VEOLA McLEAN; ALICIA CHISHOLM; KING S. CAMERON; JEANE HENDON; JOYCE MALONE; DEBORAH McMILLAN; DORIS TURNER; VIOLET HENDERSON; NANCY ALEXANDER; CATHERINE GUTIERREZ; NANCY McGLONE; JESSIE WILLIAMS; DIANNE SHEPPARD; LEONZA LOFTIN; SANDRA L. BLUE,

Plaintiffs,

versus

UNITED STATES DEPARTMENT OF THE ARMY; JOHN O. MARSH, JR., Secretary, U. S. Department of the Army,

Defendants-Appellees.

APPEALS FROM the United States District Court for the Eastern District of North Carolina, at Fayetteville.

THESE CAUSES came to be heard on the record from the United States District Court for the Eastern District of North Carolina and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed in part and reversed in part. This case is remanded to the United States District for further proceedings consistent with the opinion filed herewith.

s/s

CLERK

For Pages A-55 Through A-603
See Supplemental Appendix

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

MATTIEBELLE HARRIS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	No. 81-60-CIV-3
JOHN O. MARSH, Jr.,	)	
	)	
Defendant.	)	

LEONZA LOFTIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	No. 80-168-CIV-3
JOHN O. MARSH, Jr.,	)	
	)	
Defendant.	)	
	)	
	)	
	)	

ORDER

This matter is before the court by mandate of the Fourth Circuit Court of Appeals, pursuant to its Order in *Blue v. United States Dept. of the Army*, 914 F.2d 525 (1990) (hereinafter, "*Blue*"), which affirmed in part and reversed in part and remanded to this court the order reported at *Harris v. Marsh*, 679 F. Supp. 1204 (E.D.N.C. 1987) (hereinafter, "*Harris*"). The legal and factual predicates for the order to follow have fully

been set forth in the above-cited cases and need not be reiterated herein.

The Fourth Circuit summarized its holding in *Blue* as follows:

> the sanction against Ms. Sumter is set aside in its entirety; the sanction against Mr. Chambers is upheld, but is reduced by the amounts awarded for judicial salaries and for defense of the sanctions hearing; the sanctions against Ms. Harris and Ms. Blue are upheld, but are reduced by the amounts awarded for judicial salaries; the sanction against the law firm Ferguson, Stein, Watt, Wallas & Adkins is set aside; the order directing the NAACP Legal Defense Fund to pay no monies toward counsel's sanctions is vacated; and the reprimand of counsel for a breach of professional ethics and its accompanying fine are also vacated.

Blue, 914 F.2d at _____.

The following calculations illustrate this court's compliance with *Blue* in re-calculating sanctions awards (a) by removing all sums representing judicial salaries as to plaintiffs Blue and Harris, and Chambers, and (b) by removing from sanctions imposed against Chambers all sums representing defense attorneys' fees, costs and expenses in prosecuting sanctions motions against plaintiffs and their counsel.

Blue's Claims

A. Court expenses

1. Substantive claims[1]

72 hours x $40 = $2,880.00

a. Ms. Blue's liability $486.81

b. Mr. Chambers' liability $1,331.67[2]

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[1] *Harris*, 679 F. Supp. at 1325. $40.00 represents the hourly rate for time expended by the courtroom clerk and court reporter, as allowed in *Blue*, 914 F.2d at ____, pursuant to 28 U.S.C. § 1920.

[2] Pursuant to the original order, Ms. Blue was ordered to pay $5,000, or 16.903% of the $29,580.00 total court expense sanction, and the balance was

(Footnote continued)

2. Sanctions motion (Ms. Blue only)[3] 9 hours x $40 =	$	360.00
B. Attorneys' fees, costs and expenses		
1. Ms. Blue's liability	$	8,000.00[4]
2. Chambers liable for balance of fees, costs and expenses, excluding those incurred by defense counsel in prosecuting the sanctions motion:		
* Loewenberg: 54.5 hrs x $75 =	$	4,087.50[5]
Travel & per diem		787.50[6]
* Litigation support team		10,593.75[7]
* Photocopying		108.00[8]
TOTAL	$	15,576.75[9]
(Ms. Blue's liability)	-	8,000.00[10]
Mr. Chambers' liability	$	7,576.75

assessed against counsel. *Harris*, 679 F. Supp. at 1392. Here, Blue is ordered to pay 16.903% of the $2,880.00 amended total. The original order allocated to Chambers 55.644% of the total amount of sanctions imposed against counsel ($30,000/$53,913.62 = 55.644%). Here, Chambers is ordered to pay 55.644% of the balance of the court expenses for substantive claims ($2,393.19 x .55644 = $1,331.67).

[3] *Id.* at 1325-26.

[4] *Id.* at 1392. The original order required Blue to pay $8,000 of the $17,999.25 total which encompassed both substantive claims and sanctions motion. This figure is undisturbed because the sanctions motion award against the individual plaintiffs was upheld as a result of their having perjured themselves during the sanctions hearing. *Blue*, 914 F.2d at ____.

[5] *Harris*, 679 F. Supp. at 1330, 1333 (33 hrs + 21.5 hrs).

[6] *Id.* at 1331, 1333.

[7] *Id.* at 1334-38.

[8] *Id.* at 1337.

[9] This figure also results from deducting disallowed sums from the original total: $17,999.25 (original total, *Harris*, 679 F. Supp. at 1338), less $150.00 (Loewenberg sanctions travel, *id.* at 1331), less $1,200.00 (Loewenberg sanctions hearing time, *id.* at 1333), less $60.00 (Berry sanctions travel, *id.* at 1334), less $1,012.50 (Berry sanctions hearing time, *id.* at 1334) = $15,576.75.

[10] *Supra*, note 4.

C. Further attorney's fees awarded in *Harris v. Marsh*, 123 F.R.D. 204 (E.D.N.C. 1988) with regard to Blue's substantive claims in MPA's 273-70 and 303-79:

1. Ms. Blue's liability	$ 3,000.00[11]
2. Mr. Chambers' liability	$ 4,000.00[12]

D. Summary of sanctions award due as a result of Blue's claims

1. Ms. Blue's liability	$ 11,846.81
2. Mr. Chambers' liability	$ 12,908.42

Harris' Claims

A. Court expenses
23.5 hrs x $40 - 10% =
Harris' liability $ 846.00[13]

B. Attorneys' fees, costs & expenses

1. Harris' liability	$ 15,000.00[14]
2. Chambers' liable for fees, costs and expenses, excluding those incurred by defense counsel in prosecuting the sanctions motions:	
* Williams: 194 hrs 10 min x $75 =	$ 14,562.49[15]

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[11] Harris v. Marsh, 123 F.R.D. at 228.

[12] *Id.* All sanctions against Geraldine Sumter were stricken. *Blue*, 914 F.2d at ____.

[13] *Harris*, 679 F. Supp. at 1365. No court expense sanctions were imposed on substantive claims, as none were tried. This figure represents only courtroom clerk and court reporter time during sanctions motion hearings. *See* note 1, *supra*.

[14] *Harris*, 679 F. Supp. at 1392. The original order required Harris to pay $15,000 of the $28,009.37 total which encompassed both substantive claims and sanctions motion. This figure is undisturbed because the sanctions motion award against the individual plaintiffs was upheld as a result of their having perjured themselves at the sanctions hearings. *Blue*, 914 F.2d at ____.

[15] *Harris*, 679 F. Supp. at 1366-67.

Travel & per diem	421.00[16]
* Litigation support team	6,462.50[17]
* Photocopying	3,452.50[18]
* Expenses	500.00[19]
SUBTOTAL	$ 25,398.49
	- 10% [20]
TOTAL	$ 23,858.65[21]
(Ms. Harris' liability)	- 15,000.00[22]
Mr. Chambers' liability	$ 7,858.65

C. Summary of sanctions award due as a result of Harris' claims:

1. Ms. Harris' liability	$ 15,846.00
2. Mr. Chambers' liability	$ 7,858.65

****

The Fourth Circuit Court of Appeals vacated this court's reprimand of plaintiffs' counsel for a breach of professional ethics, as well as the accompanying fine. *Blue*, 914 F.2d at ____. These sanctions were found to have been imposed in violation of the procedure set forth in Rule 105.01 of the Rules of Disciplinary Procedure adopted by the United States District Court for the Eastern District of North Carolina. *Id.* Absent direction in the Court of Appeals' opinion, and in deference to the content thereof, this court declines to pursue further proceedings with regard to heretofore perceived ethical violations.

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[16] *Id.* at 1366.

[17] *Id.* at 1369.

[18] *Id.*

[19] *Id.*

[20] Because Harris prevailed on the frivolity aspect of two claims, the potential sanctions award was reduced by ten percent (10%). *Id.* at 1370.

[21] This figure also results from deducting disallowed sums from the original total: $31,121.52 (original total, *Harris*, 679 F. Supp. at 1370), less $438.14 Williams sanctions travel, *id.* at 1366), less $3,037.50 (Loewenberg sanctions hearing time, *id.* at 1367), less $354.05 (Loewenberg sanctions travel, *id.*), less $275.00 (Smith research, *id.* at 1367-68), less $1,575.00 (Berry sanctions hearing time, *id.* at 1368), less $43.34 (Berry sanctions travel, *id.*) = $25,398.49, less 10% (*id.* at 1370) = $22,858.64.

[22] *Id.* at 1392; *see supra*, note 14.

Conclusion

Pursuant to the mandate of *Blue v. United States Dept. of the Army*, 914 F.2d 525 (1990), the orders heretofore entered in *Harris v. Marsh*, 679 F. Supp. 1204 (E.D.N.C. 1987) and *Harris v. Marsh*, 123 F.R.D. 204 (E.D.N.C. 1988), are hereby AMENDED to provide as follows:

1. Plaintiff Sandra Blue is ORDERED to pay $846.81 in court expenses. She is further ORDERED to pay $8,000.00 in defendants' attorneys' fees, costs and expenses, plus $3,000.00 in further trial fees;

2. Plaintiff Beulah Mae Harris is ORDERED to pay $846.00 in court expenses. She is further ORDERED to pay $15,000.00 in defendants' attorneys' fees, costs and expenses;

3. Plaintiffs' counsel, J. LeVonne Chambers, is ORDERED to pay $1,331.67 in court expenses, $15,435.40 in attorneys' fees, costs and expenses, plus $4,000.00 in further trial fees awarded in the Blue claims;

4. The sanction against Ms. Geraldine Sumter is vacated in its entirety;

5. The sanction against the law firm of Ferguson, Stein, Watt, Wallas & Adkins is vacated;

6. The order directing the NAACP Legal Defense Fund to pay no monies toward counsel's sanctions is vacated;

7. The reprimand of counsel for a breach of professional ethics and the accompanying fine are vacated.

8. All monies are to be paid within sixty (60) days of the date of service of the Clerk's Judgment entered pursuant to Rule 58, Fed. R. Civ. P.

The Clerk of Court is hereby DIRECTED to enter Judgment accordingly.

SO ORDERED.

This 8th day of November, 1990.

/s/James C. Fox

JAMES C. FOX
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

MATTIEBELLE HARRIS, et al., Plaintiffs,	)	
v.	)	No. 81-60-CIV-3
JOHN O. MARSH, Jr., Defendant.	)	

LEONZA LOFTIN, Plaintiff,	)	
v.	)	No. 80-168-CIV-3
JOHN O. MARSH, Jr., Defendant.	)	

AMENDED JUDGMENT

It is ORDERED, ADJUDGED and DECREED as follows:

1. Plaintiff Sandra Blue is ordered to pay $846.81 in court expenses. She is further ordered to pay $8,000.00 in defendants' attorneys' fees, costs and expenses, plus $3,000.00 in further trial fees;

2. Plaintiff Beulah Mae Harris is ordered to pay $846.00 in court expenses. She is further ordered to pay $15,000.00 in defendants' attorneys' fees, costs and expenses;

3. Plaintiffs' counsel, J. LeVonne Chambers, is ordered to pay $1,331.67 in court expenses, $15,435.40 in attorneys' fees, costs and expenses, plus $4,000.00 in further trial fees awarded in the Blue claims;

4. The sanction against Ms. Geraldine Sumter is vacated in its entirety;

5. The sanction against the law firm of Ferguson, Stein, Watt, Wallas & Adkins is vacated;

The order directing the NAACP Legal Defense Fund to pay no monies toward counsel's sanctions is vacated;

7. The reprimand of counsel for a breach of professional ethics and the accompanying fine are vacated; and

8. All monies are to be paid within sixty (60) days of date of entry of this Amended Judgment.

THIS AMENDED JUDGMENT WAS FILED & ENTERED THIS 14th DAY OF NOVEMBER, 1990, & COPIES MAILED TO THE FOLLOWING:

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Date: November 14, 1990

J. RICH LEONARD, Clerk

By: /s/Ann Caviniss

Deputy Clerk

STATUTES

28 U.S.C. § 1927. Counsel's liability for excessive costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

42 U.S.C. § 1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 2000e-5. Enforcement provisions

(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from

the date upon which the Commission is authorized to take action with respect to the charge.

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever

is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be

appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(h) The provisions of sections 101 to 115 of Title 29 shall not apply with respect to civil actions brought under this section.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000e-16. Employment by Federal Government

(a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—

> (1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and
>
> (2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint,

may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure non-discrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 16. Pretrial Conferences; Scheduling; Management

(a) **Pretrial Conference; Objectives.** In any action, the court may in its discretion direct the attorneys for the

parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as

(1) Expediting the disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation, and;

(5) facilitating the settlement of the case.

(b) **Scheduling and Planning.** Except in categories of actions exempted by district court rule as inappropriate, the judge, or a magistrate when authorized by district court rule, shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;

(2) to file and hear motions; and

(3) to complete discovery.

The scheduling order also may include

(4) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(5) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in no event more than 120 days after filing of the complaint. A schedule shall not be modified except by leave of the judge or a magistrate when authorized by district court rule upon a showing of good cause.

(c) **Subjects to be Discussed at Pretrial Conferences.** The participants at any conference under this rule may consider and take action with respect to

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence;

(5) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(6) the advisability of referring matters to a magistrate or master;

(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;

(8) the form and substance of the pretrial order;

(9) the disposition of pending motions;

(10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and

(11) such other matters, as may aid in the disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.

(d) **Final Pretrial Conference.** Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(e) **Pretrial Orders.** After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

(f) **Sanctions.** If a party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or

if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.